TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 198

MAURO JOHN MONTANA, PETITIONER,

vs.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 29, 1960
CERTIORARI GRANTED OCTOBER 17, 1960

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APPENDIX

1 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MAURO JOHN MONTANA, Plaintiff,
vs.
WILLIAM ROGERS, Attorney General of the United States, Defendant.
No. 58 C 1620

STATEMENT PURSUANT TO RULE 12(c) OF THE UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

This cause was instituted by the filing of a Complaint on September 3, 1958; the original parties to the action were Mauro John Montana, Plaintiff, and William Rogers, Attorney General of the United States and Edward P. Ahrens, Chicago District Director of Immigration and Naturalization, Defendants; an answer thereto was filed November 10, 1958, an amended complaint was filed March 25, 1959, to which answer was filed May 5, 1959; on April 29, 1959, Edward P. Ahrens was dismissed as a party defendant and Count 2 of the amended complaint was dismissed, both on motion of the Government; trial was had on Count 1 of the amended complaint and the answer thereto on November 16, 1959, before the Honorable Julius H. Miner; no questions were referred; pursuant to said trial, judgment was entered in favor of
2 the defendant, William Rogers, Attorney General of the United States and the complaint dismissed pur-

suant to Findings of Fact and Conclusions of Law filed November 20, 1959. Notice of Appeal was filed by the plaintiff December 1, 1959.

/s/ Anna R. Lavin
Anna R. Lavin,
Attorney for Plaintiff-Appellant,
Mauro John Montana.

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9 UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

ANSWER
(Filed Nov 14 1958)

Now comes the defendant, William Rogers, Attorney General of the United States, by R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, and for answer to plaintiff's complaint states as follows:

1. Defendant admits the allegations of Paragraph 1 of plaintiff's complaint.

2. Defendant admits the allegations of Paragraph 2 of plaintiff's complaint.

3. Defendant admits the allegations of Paragraph 3 of plaintiff's complaint.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of plaintiff's complaint and neither admits nor denies the same. but demands strict proof thereof.

10 5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 5 of plaintiff's complaint and neither admits nor denies the same, but demands strict proof thereof. For further answer to the allegations of

Paragraph 5 of plaintiff's complaint, defendant admits that Maddelena Mondano has never relinquished or lost her status as a United States citizen if in fact, she ever possessed such status.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of Paragraph 6 of plaintiff's complaint, and neither admits nor denies the same, but demands strict proof thereof.

7. Defendant admits the allegations of Paragraph 7 of plaintiff's complaint that the said Maddelena Mondano sojourned to Italy in 1906, and as to the remaining allegations of Paragraph 7 of plaintiff's complaint, defendant states that he is without knowledge or information sufficient to form a belief as to their truth and demands strict proof thereof.

8. Defendant denies the allegations of Paragraph 8 of plaintiff's complaint.

9. Defendant denies the allegations of Paragraph 9 of plaintiff's complaint.

10. Defendant admits the allegations of Paragraph 10 of plaintiff's complaint that plaintiff was born outside the continental limits of the United States and as to the remaining allegations of Paragraph 10 of plaintiff's complaint, defendant states that he is without knowledge or information sufficient to form a belief as to their truth and demends strict proof thereof.

11 11. Defendant admits the allegations of Paragraph 11 of plaintiff's complaint that following the sojourn of the said Maddelena Montana to Italy, the said Maddelena Montana returned to the United States some time subsequent to July 30, 1906, and as to the remaining allegations of Paragraph 11 of plaintiff's complaint, defendant states he is without knowledge sufficient to form a belief as to their truth, and demands strict proof

thereof. For further answer to Paragraph 11 of plaintiff's complaint, defendant states that prior to 1924, an United States citizen did not require an United States passport to re-enter the United States.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12, but demands strict proof thereof.

13. The allegations of Paragraph 13 of plaintiff's complaint are matters peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same, but demands strict proof thereof.

14. Defendant admits the allegations of Paragraph 14 of plaintiff's complaint.

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12-25 • • •

26 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

MOTION FOR DISCOVERY AND PRODUCTION OF DOCUMENTS
(Filed Mar 18 1959)

Now comes the plaintiff, Mauro John Montana, by his attorney, Anna R. Lavin, and moves the Court for the entry of an order requiring defendants to produce and permit the inspection and copying by the plaintiff of the following documents, and as a basis therefor says that the said documents are necessary in proper and adequate presentation on trial of the allegations of his Amended Complaint and that the whereabouts and obtaining of said documents are available to defendants and beyond the reach of the plaintiff:

1. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Lena

(Madeline) Montana (Mondano) and filed with, or issued by or maintained in any of the agencies of the Department of Justice, State and Labor for the period commencing September 1, 1905, through and
27 including October 1, 1906, during which said period the aforesaid Lena Montana departed this country and re-entered via the port of New York City, New York;

2. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Mauro John Montana filed with, or issued by, or maintained in any of the agencies of the Departments of Justice, State and Labor, for the period commencing September 1, 1905, through and including October 1, 1906;

3. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor, by or on behalf of any child of Lena (Madeline) Montana (Mondano) filed with, or issued by or maintained in any of the agencies of the Departments f Justice, State and Labor for the period commencing September 1, 1905 through and including October 1, 1906;

4. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Lena (Madeline) Montana (Mondano) filed with the Consular's Service of the United States at Naples, Italy, and maintained in its records. or in the records of the Department of State or the Department of Labor for the period commencing October 1, 1905, through
28 and including October 1, 1906;

5. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Mauro John Montana, filed with the Consular's Service of the United States at Naples, Italy, and maintained in its records, or in the records of the Department of State or the Department of Labor, for the period commencing October 1, 1905, through and including October 1, 1906;

6. Certificate of Arrival (Department of Labor) No. 541860 relating to Mauro John Montana.

/s/ Anna R. Lavin
Anna R. Lavin
Attorney for Plaintiff

One North LaSalle St.
Chicago 2, Illinois
RAndolph 6-7855

29 IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

AMENDED COMPLAINT
(Filed Mar 25 1959)

Now comes the plaintiff, Mauro John Montana, by his attorney, Anna R. Lavin, and with leave of court first had and obtained, files this Amended Complaint against the defendants, William Rogers, as Attorney General of the United States, and Edward P. Ahrens, District Director, Immigration and Naturalization Service, Chicago, Illinois, and states as follows.

Count I

1. The jurisdiction of this Court is invoked and these proceedings are instituted against the defendant under

Section 1503 of Title 8 of the Nationality Act of 1952 (8 U.S.C. 1503), for a judgment declaring the plaintiff to be a citizen and national of the United States of America.

30 2. Defendant, William Rogers, is the duly appointed qualified and acting Attorney General of the United States. The Immigration and Nationality Service is a department of the defendant and under his direction and control.

3. Defendant, Edward P. Ahrens, is the duly appointed and acting District Director of the Immigration and Naturalization Service, Chicago, Illinois.

4. Plaintiff Mauro John Montana is a permanent resident of the Village of LaGrange, within the Northern District of Illinois and claims his permanent residence within the jurisdiction of this Court.

5. Plaintiff is the true and lawful blood child of Maddelena Montana, who is a native born citizen of the United States.

6. Maddelena Montana was born in Jersey City, New Jersey, on the 2nd day of October, 1890 of Giovanni Mondano and Rose Mondano, his wife, both of whom were naturalized citizens of the United States at the time of the birth of the said Maddelena Montana.

7. Maddelena Mondano, from the 2nd day of October, 1890 to and on about the 2nd day of February, 1906, was continuously within the continental limits of the United States.

8. On or about the 3rd day of January, 1905, the said Maddelena Mondano married one Giuseppa Montana in Bayonne, New Jersey.

31 9. The said Maddelena Montana, journeyed to Italy on or about the 2nd day of February, 1906, accompanied by her husband and her parents as aforesaid. She departed from New York City in January of

1906, at which time she was already pregnant with said child and on February 2, 1906, when she arrived at Naples, Italy, her pregnancy was in the fifth month.

10. That approximately two months thereafter she attempted to return to the United States and was prevented from so doing by and through the actions of the then acting and duly constituted American Consul, the highest ranking United States official in the province of Naples, Italy, where she was visiting.

11. The prohibition of the aforesaid American Consul continued to, and included, approximately the 30th day of July, 1906.

12. That, theretofore, on, to-wit the 26th day of June, 1906, there was born to the said Maddelena Montana, at Acerra, Italy, a son, Mauro John Montana, the plaintiff here.

13. That on or about the aforesaid 30th day of July, 1906, Maddelena Montana entered the United States traveling on a United States passport, recognizing her as a citizen of the United States, accompanied by the plaintiff whose name and/or description was endorsed on the said United States passport.

14. That, from the 30th day of July, 1906, to the present, the plaintiff has never been without the
32 continental limits of the United States.

15. That on the 1st day of August, 1924, and other times prior and subsequent thereto, the plaintiff had and has pledged allegiance to the United States of America and has renounced all foreign sovereigns, powers and potentates.

16. That on or about the 7th day of January, 1958, the plaintiff was served by the Immigration and Nationality Service with an order to show cause why he should not be deported which said order to show cause is incorporated and identified in immigration file No. A4 973-720.

17. That deportation hearing proceedings commenced on the 15th day of January, 1958; that, from the inception of that hearing, questions as to the jurisdiction of the hearing officials was raised and eventually affirmatively challenged with a demand for termination of said immigration proceedings because of the claimed United States citizenship of the plaintiff.

18. The plaintiff's demand for termination of the immigration proceedings seeking deportation, on the ground of want of jurisdiction because of his citizenship of the United States, was denied and the hearing proceeded, with the plaintiff refusing to take further part thereafter.

19. The plaintiff contends that the denial and refusal of the Immigration and Nationality Service at Chicago, Illinois to terminate the deportation proceedings, on
33 the ground that he was a citizen of the United States. is a denial of his right as a citizen of the United States.

20. On or about the 10th day of September, 1958, the District Director of Immigration and Naturalization (predecessor of the defendant Edward P. Ahrens) by and through his subordinate, Roy Anadell, Assistant Director for Deportation, Chicago District informed this plaintiff that his deportation has been directed, and the plaintiff verily believes said defendant intends to continue and proceed with said deportation and will do so, unless restrained by an injunction of this Court.

21. The plaintiff contends that the matters and things described in paragraph 20 hereinabove constitute a denial of a right of plaintiff as a citizen of the United States, which denial is based on the alleged ground that he is not a citizen of the United States.

22. Plaintiff is a United States citizen, such citizenship having been acquired pursuant to the provisions

of the 14th Amendment to the Constitution of the United States and Paragraph 9 of Article 1 of the Constitution of the United States and the laws and statutes enacted pursuant thereto.

23. Plaintiff has never performed any act, nor executed any instrument of expatriation. Plaintiff is entitled to be declared a citizen and national of the United States.

34 Wherefore, plaintiff prays for the entry of a judgment and decree:

(a) Declaring him to be a citizen of the United States;

(b) That the proceedings identified as: "In the Matter of Mauro John Montana, Immigration and Nationality file No. A4 973 720", be declared null and void and of no effect;

(c) The the defendants, their agents, attorneys, and servants be restrained and enjoined from taking any action in respect of the proceedings described in Paragraph (b) hereinabove, until the further order of this Court; and

(d) For such other and further relief as may be just and proper in the premises.

Count II

1-19. Paragraphs 1 through 19 of Count I are incorporated by reference as paragraphs 1 through 19 of Count II as though fully re-alleged and set forth.

20. On or about the 15th day of April, 1958, plaintiff applied to the defendant. Attorney General of the United States, for a Certificate of Citizenship under and pursuant to the provisions of Section 341 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1452).

21. On or about the 29th day of September, 1958, said application was denied by the District Director, Immigra-

tion and Naturalization Service on the stated ground
35 that the plaintiff had not established that he acquired or derived United States citizenship under any provision of law, which said denial was affirmed by the Regional Commissioner on or about the 16th day of October, 1958.

22. The said denial and refusal of the defendant, William Rogers, Attorney General of the United States, his agents and subordinates to comply with the mandatory provisions of Section 341 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1452) on the aforestated were arbitrary and capricious and constitute a denial of the right or privilege of the plaintiff as a citizen of the United States on the alleged ground that he is not a citizen of the United States.

23-26. The allegations of paragraphs 20 through 23 of Count I are incorporated by reference as paragraphs 23 through 26 of Count II as though fully re-alleged and set forth.

Wherefore, plaintiff prays for the entry of a judgment and decree:

(a) Declaring him to be a citizen of the United States;

(b) That the proceedings identified as: "In the Matter of Mauro John Montana, Immigration and Nationality File No. A4 973 720", be declared null and void and of no effect;

(c) That the defendants, their agents, attorneys, and servants be restrained and enjoined from taking any action in respect of the proceedings described in
36 Paragraph (b) hereinabove, until the further order of this Court; and

(d) For such other and further relief as may be just and proper in the premises.

/s/ Anna R. Lavin
Anna R. Lavin,
Attorney for Plaintiff,
Mauro John Montana

One North LaSalle Street
Chicago 2. Illinois
RAndolph 6-7855

James S. Montana, being on oath first duly sworn, deposes and says that he has read the foregoing complaint, knows the contents thereof and that the facts stated therein are true.

/s/ James S. Montana

Subscribed and sworn to before me
this 17 day of March, 1959.
/s/ Faith H. Salk
Notary Public (Seal)

37 UNITED STATES DISTRICT COURT

(Caption—No. 58 C 1620)

MOTION
(Filed Mar 30 1959)

Now comes the defendant William Rogers, Attorney General of the United States, by his attorney R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, and moves this Honorable Court for the entry of an order dismissing plaintiff's Amended Complaint on the grounds that the said Amended Complaint fails to state a cause of action in that as to Count 1 there is no allegation that plaintiff has been denied any right or privilege as a national of the United States on the grounds that he is not a national of the

United States and as to Count II which incorporates by reference Paragraphs 1 through 19 in Count I, the said Count II shows on its face that plaintiff was born without the continental limits of the United States in 1906
38 and as a matter of law is not a citizen of the United States by virtue of the several provisions of the United States Statutes and Acts enumerated in Section 341 of the Immigration and Nationality Act of 1952.

/s/ R. Tieken
R. Tieken,
United States Attorney

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42 IN THE UNITED STATES DISTRICT COURT

Wednesday, April 29, 1959

Present: Honorable Julius H. Miner, District Judge

• • (Caption—No. 58 C 1620) • •

The Court being fully advised in the premises, it is

Ordered that the motion of the Government to dismiss Edward P. Ahrens as a party defendant herein be and it hereby is allowed and that said defendant be and he hereby is dismissed from this case, and it is

Further Ordered that the Government's motion to dismiss the amended complaint be and it hereby is overruled as to Count I thereof and sustained as to Count II, and that Count II of the amended complaint be and it hereby is dismissed, and it is

Further Ordered that the Government be and hereby is given, 5 days from this date in which to file an answer to Count I of the complaint and objections to plaintiff's interrogatories, and that hearing on the Government's objections to plaintiff's interrogatories, and that hearing on the Government's objections to plaintiff's interrogatories be and it hereby is set for May 13, 1959, and it is

Further Ordered that this cause be stricken from the trial call of May 11, 1959.

43 UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S MOTION FOR DISCOVERY AND PRODUCTION OF DOCUMENTS.

(Filed May 5 1959)

Now comes the defendant, William Rogers. Attorney General of the United States, by R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division and objects to plaintiff's motion for discovery and production of documents as follows:

1. Defendant objects generally to all demands on the grounds that the documents sought thereby are neither pertinent nor material to the issue of plaintiff's alleged United States citizenship.

2. Defendant objects to those portions of plaintiff's demand enumerated in plaintiff's paragraphs 1, 2, 3 and 4 which called for documents filed, issued or maintained by the Department of State or the Department of Labor, on the ground that neither department is a party to this action.

3. Defendant objects to paragraphs 4 and 5 on the ground that the demands contained therein called for documents and records of the Department of State or the Department of Labor, neither of which are parties to this action.

44 4. Defendant objects to Paragraph 1 of plaintiff's motion, on the ground that it is too general and further objects to the gratuitous concluding phrase of the said paragraph 1 as being completely lacking in materiality.

5. Defendant objects to paragraphs 2, 3, 4 and 5 on the grounds that they are too general.

6. Defendant objects to paragraphs 1, 2, 3, 4 and 5 of plaintiff's motion on the further ground that they are no more than a fishing expedition interposed for the purpose of delay.

/s/ R. Tieken
R. Tieken,
United States Attorney
Attorney for Defendant

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46 UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S INTERROGATORIES

(Filed May 5 1959)

1. Defendant objects to the written interrogatories of plaintiff on the grounds that they are patently lacking in materiality and are propounded solely for the purpose of delay.

2. Defendant objects to Interrogatory No. 1 on the ground that if there was a United States Consul in Naples, Italy, in 1906, that information would be in the possession of the Department of State who is not a party to this cause. Defendant further objects to Interrogatory No. 1 on the ground that the information sought to be obtained thereby is not relevant nor material to plaintiff's cause of action.

3. Defendant objects to Interrogatory No. 2 insofar as it requests information relating to individuals who are, or were, or will be employees of the Department of State, and that neither the Department of State, nor past, present or future employees of the Department of State are parties to this litigation, and defendant further

objects to the breadth of the said interrogatory and
47 states that its patent purpose is interposed for delay as is demonstrative by the fact that although it requests names, it does not request any addresses.

4. Defendant objects to Interrogatory No. 3 on the grounds that it is a double question, is vague and calls for information that is not in the possession of the Department of Labor which is not a party to this action.

5. Defendant objects to Interrogatory No. 4 in that it seeks a legal conclusion and an expression of a legal opinion by the Attorney General of the United States.

/s/ R. Tieken
R. Tieken,
United States Attorney.
Attorney for Defendant

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49 UNITED STATES DISTRICT COURT

• • (Caption—No. 58 C 1620) • •

ANSWER TO COUNT I OF PLAINTIFF'S AMENDED COMPLAINT
(Filed May 5 1959)

Now comes the defendant, William Rogers, Attorney General of the United States by his attorney R. Tieken, United States Attorney for the Northern District of Illinois, Eastern Division and for answer to Count I of Plaintiff's Amended Complaint states as follows:

1. Defendant admits the provisions of Section 1503, Title 8, United States Code and denies this court has any jurisdiction of this cause thereunder and the plaintiff's complaint fails to state a cause of action.

2. Defendant admits the allegations of Paragraph 2 of plaintiff's Count I Amended Complaint.

3. Defendant denies the allegations of Paragraph 3 of plaintiff's Count I Amended Complaint.

4. The matters alleged in Paragraph 4 of plaintiff's Count I Amended Complaint are peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

5, 6, 7, 8 and 9. The matters alleged in Paragraphs 5, 6, 7, 8 and 9 of plaintiff's Count I Amended Complaint are peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

10. 11. For answer to Paragraphs 10 and 11 of plaintiff's Count I Amended Complaint, defendant states that the matters therein alleged are not material and neither admits nor denies the same.

12, 13 and 14. The matters alleged in Paragraph 12, 13 and 14 of plaintiff's Count I Amended Complaint are peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

15. For answer to Paragraph 15 of plaintiff's Count I Amended Complaint, defendant states that the matter therein alleged is not material and neither admits nor denies the same.

16. Defendant admits the allegations of Paragraph 16 of plaintiff's Count I Amended Complaint.

17. For answer to Paragraph 17 of Count I of plaintiff's Amended Complaint, defendant admits that deportation hearing proceedings were commenced on January 15, 1958 and as to the remaining allegations of the said Paragraph 17, if they are factual are too vague to admit of answer.

18. In answer to Paragraph 18 of Count I of plaintiff's Amended Complaint, defendant admits that plaintiff's demand for termination of the proceedings was denied and for further answer to the remaining factual allegations, if any, in Paragraph 18 of Count I of plaintiff's Amended Complaint, states that they are not

material and defendant neither admits nor denies the same.

51 19. For answer to Paragraph 19 of Count I of plaintiff's Amended Complaint, defendant states that what plaintiff contends on the grounds therefor are peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

20. Defendant admits the factual allegations of Paragraph 20 of Count I of plaintiff's Amended Complaint and for answer to what plaintiff "verily" believes, defendant states that what plaintiff believes is peculiarly within the knowledge of plaintiff and defendant neither admits nor denies the same.

21. Defendant denies the allegations of Paragraph 21 of Count I of plaintiff's Amended Complaint.

22. Defendant denies the allegations of Paragraph 22 of Count I of plaintiff's Amended Complaint.

23. Defendant denies the allegations of Paragraph 23 of Count I of plaintiff's Amended Complaint.

Wherefore, defendant denies that plaintiff is entitled to the relief sought by his prayer of Count I of his Amended Complaint and demands that plaintiff's complaint be dismissed sine die.

/s/ R. Tieken
R. Tieken,
United States Attorney
Attorney for Defendant

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53 IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 58 C 1620) * *

ORDER DIRECTING PRODUCTION OF DOCUMENTS
(Entered May 13 1959)

This cause coming on to be heard on the motion of the plaintiff, Mauro John Montana, made pursuant to Rule 34 of the Federal Rules of Civil Procedure, and good cause being shown therefore,

It Is Hereby Ordered that the defendant William Rogers, Attorney General of the United States will, on the 27th day of May, 1959, at 3:00 in the afternoon at the office of the United States Attorney for the Northern District of Illinois, 450 U. S. Court House, Chicago 4, Illinois, produce and permit the inspection and copying by the plaintiff of the following described documents which may be within his possession

1. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Lena (Madeline) Montana (Mondano) and filed with, or issued by or maintained in any of the agencies of the Department of Justice, for the period commencing September 1, 1905, through and including October 1, 1906.
2. Documents relating to any passport, application or applications therefor, visa or visas, or application or applications therefor by, or on behalf of Mauro John Montana filed with, or issued by, or maintained in any of the agencies of the Departments of Justice for the period commencing September 1, 1905, through and including October 1, 1906.

54 3. Certificate of Arrival (Department of Labor) No. 541860 relating to Mauro John Montana.

/s/ Julius H. Miner
Julius H. Miner
Judge

May 13, 1959

TRANSCRIPT OF PROCEEDINGS

1-78 • • •

79 • • • MADDELENA MONTANA, called as a witness on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Miss Lavin.

Q. Will you state your name, please?
A. Maddelena Montana.
Q. Would you spell your first name, please?
A. M-a-d-d-e-l-e-n-a.
Q. Are you known by any other name?
A. Lena. They call me Lena for short.
Q. What is your address?
A. 914 West Polk Street.

• • •

By Miss Lavin:

Q. Are you the mother of Mauro John Montana, the plaintiff in this cause?

A. Yes.

80 Q. Mrs. Montana, where were you born?
A. Jersey City, New Jersey.
Q. In what year?
A. 1890.
Q. How long did you live in Jersey City?
A. In Jersey City until I got married.
Q. When was that, Mrs. Montana?
A. I got married the 26th of August.
Q. The 26th of August of what year?
A. 1905.
Q. Whom did you marry?
A. Joe Montana.
Q. Is he known by any other name?
A. No.

Q. Is he known by the Italian equivalent of Joe?

A. Yes.

Q. Is he known as Guiseppe?

A. Yes; that is the Italian.

Q. Where did he reside at that time?

A. Well, before I married him, you mean?

Q. Yes, ma'am.

A. He used to live in Brooklyn.

Q. Do you know how long he had lived there?

A. I guess a couple of years.

81 Q. How long had you known him prior to your marriage?

A. About a couple of years before I was married, a year or so before I was married.

Q. During that time did he reside in Brooklyn?

A. No; then he come to Bayonne.

Q. During the time you knew him prior to your marriage he resided in Brooklyn, New York, or Bayonne, New Jersey, is that right?

A. That is correct.

Q. Mrs. Montana, have you ever been outside the United States?

A. Only once.

Q. When was that?

A. When I was pregnant with my baby.

Q. Could you tell us the approximate date?

A. You mean when I left the United States?

Q. Yes, ma'am.

A. It was about the 15th or 16th of January.

Q. Nineteen hundred and what?

A. 1905.

Q. Was that prior to your marriage? Was that 1906?

A. 1905 or 1906; I don't remember that.

Q. It was after your marriage, though?

82 A. Yes, after my marriage.

Q. Where did you voyage at that time?

A. Where did I what?

Q. Where did you go?

A. When I left the United States?

Q. Yes, ma'am.

A. I went to Italy.

Q. With whom did you travel?

A. Me and my husband.

Q. Do you recall when you arrived in Italy?

A. The 2d of February.

Q. The 2d of February, 1906, is that correct?

A. That is correct.

Q. How long did you remain there?

A. Well, I was there until my baby was born.

Q. When was your baby born?

A. The 26th of June.

Q. What year?

A. 1906.

Q. Had you attempted to return to the United States prior thereto?

A. Yes, I did.

Q. When did you first attempt to return to the United States?

83 A. Well, we were there about a little over a month and a half, and then my mother and father went to this little town for the passports, and I went along with them, so they got their passports, and when it come to mine, they couldn't find no name there, and they said to me I had to go to the American Consul and get my passport to come back, so after two or three days I did.

My mother went with me, because I didn't know anything about Naples.

* * *

84 * * * By Miss Lavin:

Q. Mrs. Montana, you went to Naples with your mother, and where did you go when you went to Naples?

A. I went to the American Consul.

Q. What did you do when you arrived there?

A. When I arrived there, there was a man on the outside of the building with some uniform, and he asked me who I wanted to see, and so I told him I wanted to see the American Consul, and he took me in the building, and we went up about three or four steps, and there he introduced me to this young man and he told me that he was the American Consul.

Q. At that time did you have a conversation with
85 this young man?

A. Well, I asked him, I wanted to come back to my place where I was born. I said, "I want to go back to the United States," and he just took one look at me and he says, "I am sorry, Mrs., you cannot in that condition."

Q. What happened then, if anything?

A. He says, "You come back after you get your baby."

Q. You indicated that your mother and father were in Italy at that time. Were they residing in Italy?

A. No.

Q. For what purpose were they in Italy, if you know?

A. Well, my father was away from his people for twenty-five years, you know, and he wanted to go back and see his sisters and brothers.

Q. How long had your mother and father resided in the United States prior to that time?

A. When my father come to the United States?

Q. Yes.

A. He must have discovered it; I don't know.

Q. You don't recall?

A. No, I don't.

86 Q. Was he in the United States prior to your birth?

A. Yes.

Q. Was he a United States citizen, if you know?

A. Yes.

Q. Do you know when he was naturalized?

A. I was a little girl, but I used to hear him talk about it. I think it was 1901 or something like that.

By the Court: I would have to sustain an objection to that. That is not going to prove citizenship, what she thinks. The objection is sustained, and that part may be stricken.

By Miss Lavin: Very well.

By Miss Lavin:

Q. After you visited the American Consulate, what did you do then, if anything?

A. I went back to the little home town.

Q. Do you recall the name of that town?

A. Acerra.

Q. Acerra, Italy?

A. That is right.

Q. How long did you remain there?

87 A. I had to stay until I got my baby.

Q. How long?

A. I should say about four or five months, four months.

Q. With whom did you reside there?

A. With my mother.

Q. With your mother, and was your father still in Italy at that time?

A. When I gave birth?

Q. Yes.

A. No, he had left.

Q. Was your husband in Italy at that time?

A. He left.

Q. When did your husband leave Italy?

A. You mean what day?

Q. Approximately.

A. I couldn't say. I couldn't answer that. I don't remember that.

Q. Was it prior to the birth of the child?

A. Yes.

Q. Can you estimate how long prior to the birth of the child?

A. I should say about a couple of months, a couple of months and a half before I got my baby.

88 Q. After the baby was born, what did you do?

A. I went back to the American Consul and got my passport.

Q. Did you have a conversation with him at that time?

A. Not much. I just asked for my passport.

Q. Did you obtain a passport?

A. I did.

Q. Do you still have that passport?

A. No.

Q. Did the child obtain a travel document?

A. I asked him about my baby's passport, and he said, "You don't need it. It is in your own passport."

Q. Then you returned to the United States. Can you give us the date of your return?

A. No.

Q. How old was the child at that time?

A. The baby was about, I would say about six weeks.

Q. About six weeks old?

A. Yes.

Q. Do you know where your husband went after he left Italy?

89 A. No, I don't know, because we were on the outs. We were not talking.

Q. Do you know whether or not he returned to the United States?

A. That, I know; he come to the United States.

Q. When you came back to the United States, where did you go?

A. Well, we landed in New York, and my daddy was waiting there for me and my mother to take us home.

Q. Where did you proceed to from New York?

A. From New York to Bayonne, New Jersey.

Q. Was that your—

A. My father's apartment.

Q. Did you reside with your husband upon returning to the United States?

A. No.

Q. You are presently residing with him?

A. My mother and father—

Q. You do presently reside with your husband, though, don't you?

A. Today, yes.

Q. How long after you returned to the United States did you resume residing with your husband?

A. I would say about three months later.

90 By Miss Lavin: Mark this as Plaintiff's Exhibit No. 1, for identification.

(Said document was thereupon marked Plaintiff's Exhibit 1 for identification.)

By Miss Lavin:

Q. Mrs. Montana, what was your mother's name?

A. Rosario, and we used to call her Rose, in English, you know, Panico.

Q. And your name is Maddelena Montana, is that correct?

A. That is correct.

Q. When you returned to the United States, what was your age?

A. I don't think I was sixteen.

Q. Did you have more than one child while you were in Italy?

A. No.

Q. Did you give birth to more than one child in the year of 1906?

A. No.

Q. I show you Plaintiff's Exhibit No. 1, for identification, and I ask you to read that, and I ask you if that refers to you and your child? Can you see it?

91 A. I can't read very good. I don't know how to read this.

Q. All right. Did you have a child named Michele Montana?

A. What?

Q. Did you have a child named Michele Montana?

A. No.

Q. Did you travel to the United States on or about September 19, 1906?

A. Yes.

Q. And your name is Maddelena Montana?

A. Yes.

Q. You were then about sixteen years old?

A. That is right.

Q. Your mother's name was Rosario Panico?

A. That is right.

Q. Approximately, what was her age?

A. At that time she must have been, I would say, about fifty.

By Miss Lavin: I offer Plaintiff's Exhibit No. 1 into evidence.

By Mr. Manion: Your Honor, we object on the ground of relevancy and also on the further ground that it

92 is not competent to establish the citizenship. It is neither relevant or competent, your Honor, as proof of the citizenship of Mauro John Montana.

This document relates first to a Michele Montana, and on that ground we would object to its relevancy, on the ground that this matter neither confers citizenship and has nothing whatever to do with it, and we would object to it on the ground of competency.

By the Court: I will reserve my ruling.

By Miss Lavin: May I make a few observations relative to the objection?

By the Court: You certainly may.

By Miss Lavin: This document was produced in response to a subpoena duces tecum for the record of entry of Mauro John Montana, the plaintiff in this cause, and was thus produced by the Government. Relative to the objection of the competency, I would refer the court
93 to the case of Delmore vs. Brownell, 236 F. 2d 598.

By the Court: Aren't you going to argue that at the end of the proof?

By Miss Lavin: Yes.

By the Court: Let's reserve it.

By Miss Lavin: I reoffer Exhibit No. 1.

By the Court: It may be received in evidence subject to the objection.

(Said document, so offered and received in evidence, was marked Plaintiff's Exhibit 1.)

By the Court: Did you have it marked?

By Miss Lavin: It has been marked. Strike the identification mark.

By Miss Lavin:

Q. After you resumed residence with your husband, where did you live?

A. In the United States, you mean?

Q. Yes.

A. With my mother and father.

Q. How long did you continue living with your mother and father?

A. About three months.

Q. Where was that?

94 A. That was in Bayonne.

Q. After that where did you reside?

A. The same place in Bayonne, but with my husband after three months.

Q. How long did you reside in Bayonne with your husband?

A. About a year.

Q. After that where did you reside?

A. We came to Chicago.

Q. How long did you reside in Chicago?

A. We are here about fifty-two years.

Q. Did your son Mauro reside with you?

A. Yes.

Q. Until what age?

A. Until he got married.

Q. Do you recall when he was married?

A. He was about 21, I guess.

Q. About 21?

A. Yes.

Q. Would that be about 1927, would that be approximately correct?

A. That is correct.

Q. During the time that he was living with you and your husband, did he ever leave the continental limits

95 of the United States, if you know?

A. No.

Q. After he was married, where did he reside?

A. Well, in Chicago.

Q. Is he still residing in Chicago?

A. He is in LaGrange Park now.

Q. He resides in LaGrange Park?

A. Yes.

Q. Do you know what the address is?

A. No, I don't know the address.

Q. How long has he resided in LaGrange Park?

A. About two years.

Q. Prior to that, did he reside in and about the Chicago area?

A. The Chicago area, yes.

Q. Do you know whether or not he claims LaGrange Park as his residence?

A. Yes.

By the Court: Objection sustained. How can she tell what he claims?

By Miss Lavin: Your Honor, that is the difficulty of proof I have because of the absence of my plaintiff, but it is a jurisdictional allegation, your Honor.

96 By the Court: Objection sustained. She can't say what he claims.

By Miss Lavin: Then I have to ask for a continuance.

By the Court: Pardon?

By Miss Lavin: I would have to ask for a continuance until I can bring in the only person who is competent to say what he claims.

By the Court: Bring him in?

By Miss Lavin: Yes, sir, as he is the only one competent to testify to that.

By Mr. Manion: Your Honor, we have no objection to Mrs. Montana's statement. That is all right with us.

By the Court: Let it stand.

By Miss Lavin:

Q. Mrs. Montana, subsequent to your son's marriage, did you see him often?

A. Every day.

Q. Is that from then to now?

A. Well, yes.

Q. He was in the penitentiary for a period, though, was he not?

97 A. That is right.

Q. During the time he was in the penitentiary, how often did you see him?

A. Every two weeks.

Q. To your knowledge was he ever outside the continental limits of the United States?

A. No.

Q. Mrs. Montana, did your son Mauro ever join any military organizations?

A. What do you call that place—

By Mr. Manion: Ask her a direct question.

By Miss Lavin:

Q. Would the National Guard be correct?

A. The National Guard, that is right.

Q. When did he do that?

A. I would say he was about 17.

Q. Was that while he was residing with you?

A. That is right.

Q. How long was he in the National Guard?

A. About a year.

Q. Does Mauro John Montana have any children?

A. He has four.

Q. What are their names?

98 By Mr. Manion: I would object to this, as to the children.

By the Court: Objection sustained.

By Miss Lavin: May I ask the ground for the objection?

By the Court: Let her put it in the record. Let it go in.

By Mr. Manion: All right, your Honor.

By the Witness:

A. Joe.

By Miss Lavin:

Q. How old is he?

A. He is about 31 or 32.

Q. Was the son Joe ever a member of any military organization?

By the Court: Objection sustained. That certainly has no bearing on it.

By Miss Lavin: Your Honor, it is my obligation to show allegiance.

By the Court: Not by his children 36 years old, or 32.

By Miss Lavin: May I make the further offer of proof that at the age of 17 this child was allowed to join
99 the National Guard through permission given by his father, as were all the other sons?

By Mr. Manion: Your Honor, I don't see the relevancy. We are talking about Mauro John Montana, whether or not he is a citizen.

By the Court: That is right.

By Mr. Manion: A person can't come into the country and say, "I swear allegiance to you," and thereby become a citizen.

By the Court: Yes.

By Miss Lavin: I will make the observation, assuming the court accepts one of the several arguments that will be advanced, that there is a showing of allegiance, a manifestation of allegiance, and that there has been no renunciation of allegiance, and I can only do that by the circumstances and the manner in which he lived.

By the Court: Objection sustained.

By Miss Lavin:

Q. Referring back to the time that you were in Italy and prior to the birth of your son Mauro, you indicated your husband returned to the United States?

100 A. He returned with my father.

Q. And that was, I don't recall, how long prior to the birth of the child, did you say?

By the Court: About two and a half months.

By the Witness:

A. Yes, about two and a half months.

By Miss Lavin:

Q. Do you know for what purpose he returned to the United States?

A. He returned—we had a argument, and we weren't talking, so he just left.

Q. When you returned to the United States and you took up residence in your family's house, was your husband then living with you?

A. No.

Q. And that condition existed for how long after?

By the Court: Three months, she said.

By the Witness:

A. About three months.

By Miss Lavin: I have no further questions.

By Mr. Manion: Your Honor, the Government at this time renews its objection to the testimony of Mrs. Montana as to her conversations with anybody in Italy whom she represents to have been a Consul of the United States, and further objects to all of that testimony, because the only testimony Mrs. Montana has given is that she had a baby in Italy, and she has in no way linked up the baby she had in Italy with the plaintiff in this action.

101

It is not relevant, and at this time the Government renews its objection and moves it be stricken.

By the Court: She did testify under oath that it was the same child. I can't strike that. That is admissible.

By Mr. Manion: I didn't hear her say that the child that she had in Italy is the plaintiff in this action. I don't believe she said that.

By the Court: I think she said there was only one child born that year. Ask her.

By Miss Lavin: All right.

102 By Miss Lavin:

Q. Referring to the child that was born in Italy in 1906, what is the name of that child?

A. Mauro John Montana.

Q. Is that child the plaintiff in this case?

A. That is right.

* * *

103 * * *

104 *Cross Examination by Mr. Manion.*

Q. Mrs. Montana, can you recognize the signature of your son?

A. No.

Q. You don't believe you could?

A. No.

By the Court: How many children have you?

By the Witness: I have six living, your Honor.

By the Court: How many boys?

By the Witness: Five sons.

By the Court: How old are they?

By the Witness: 53, and then another one is 49, 47, 45, 33 and 42.

By the Court: All boys?

By the Witness: Five boys, your Honor.

By the Court: And the one next to the plaintiff is how old now?

By the Witness: 49.

By the Court: 49?

By the Witness: Yes.

By the Court: He was born where?

105 By the Witness: In Chicago. They are all born in Chicago.

By the Court: All were born in Chicago except the plaintiff?

By the Witness: That is right.

By the Court: All right; proceed.

By Mr. Manion: We have no further questions of Mrs. Montana, your Honor.

By Miss Lavin: You may step down.

(Witness excused.)

By Miss Lavin: The plaintiff rests.

By Mr. Manion: Your Honor, the Government renews its motion for judgment, verdict and judgment on the lack of showing.

By the Court: I will hear you, Miss Lavin. Do you have any other proof to offer?

By Miss Lavin: No, your Honor, I don't think so.

By Mr. Manion: Your Honor, we would rest at this time.

By the Court: You stand on the record, and you have no other evidence?

By Mr. Manion: That is correct, your Honor.

By the Court: All right.

* * *

106-123 * * *

124 * * * By the Court: I think I understand the problem and am familiar with the statutes, and the suit will be dismissed.

By Mr. Manion: Thank you.

By Miss Lavin: Your Honor, I have a very serious problem here, and that is the problem of appeal. I would like for you to stay the execution of your order pending appeal. That won't upset your order in any way.

By the Court: That will be up to the Court of Appeals, not me.

By Miss Lavin: Then I would make application for an injunction against the District Director to forego
125 executing the order of deportation.

By the Court: That will be denied.

By Miss Lavin: Pending appeal.

By the Court: It is up to the Circuit Court of Appeals to issue supersedeas if they want. It is up to them.

By Miss Lavin: I don't want to be put in the position in the Court of Appeals in not having advanced an argument to your Honor that this is a difficult problem as most problems on nationality are. I would like, of course, for your Honor to change his position, but I would certainly appreciate the opportunity of advancing my arguments in the form of a brief.

By the Court: You have your record, and I have let you put everything else in there. It is up to you to go to the Court of Appeals.

• • • •

126-127 • • •

Form I-404-A (Rev. 4-29-53)

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

M-535

NAME

MONTANO, MICHELE

PORT OF ENTRY: NEW YORK, N Y
MANIFEST NO: 3-25-1736

DATE: 9-19-06
MANNER: SS CRETIC

CERTIFICATE OF ADMISSION OF ~~ALIEN~~ U.S. CITIZEN

OFFICE REQUESTING VERIFICATION
CHICAGO, ILL.

FILE NO.
A-4 273 780, 838 9-5-57

By _____ SIGNATURE
N.Y.C. VERIFICATION CENTER
TITLE

FM/EM

AGE | SEX | MARRIED | OCCUPATION
BORN M

CITIZEN OF: U.S.A. | RACE: ---- | PLACE OF BIRTH: -----

VISA OR PERMIT NO. | SECTION: ----- | PLACE AND DATE OF ISSUE: -------

LAWFUL PERMANENT RESIDENCE
ACERRA, ITALY

DESTINATION
N.Y., NY

HEAD TAX STATUS
U.S. CITIZEN

IN U.S. BEFORE: --- | WHEN: ------ | WHERE: ------

NAME AND COMPLETE ADDRESS OF PERSON TO WHOM DESTINED
FATHER: GIUSEPPE MONTANO, 62 MULBERRY ST., NEW YORK, N.Y.

PURPOSE IN COMING AND LENGTH OF INTENDED STAY.
PERM. (AS U.S. CITIZEN)

HEIGHT	COMPLEXION	HAIR	EYES	DISTINGUISHING MARKS
---	----	--	---	---

ACCOMPANIED BY
MOTHER: MONTANO, MADDALENA 16, US BORN
(MOTHER IN U.S. BEFORE FROM 1891 TO 1906), NY
GRMOTHER: IANICO, ROSARIA 50, ALIEN
(GRMO IN U.S. BEFORE 1892 TO 1906), NY

Plaintiff's Exhibit 1

37

55 IN THE UNITED STATES DISTRICT COURT

Monday, November 16, 1959

Present: Honorable Julius H. Miner, District Judge

• • (Caption—No. 58 C 1620) • •

This cause being called for trial the parties come by their attorneys and the issues being joined the trial proceeds and at the conclusion of all the evidence the defendant William Rogers, Attorney General of the United States, moves for judgment in his favor, whereupon the trial continues, and the Court having now heard all the evidence adduced for the parties and arguments of counsel and being fully advised hands down his decision orally from the bench, counsel for the defendant to present proposed findings of fact and conclusions of law and judgment order on November 20, 1959, and it is

Ordered that plaintiff's motion for a stay order, pending appeal, be and it hereby is denied.

56 UNITED STATES DISTRICT COURT

• • (Caption—Civil No. 58 C 1620) • •

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(filed November 20, 1959)

Findings of Fact

1. Plaintiff is a resident of the Northern District of Illinois who commenced the instant proceeding under the

provisions of Sections 1452 and 1503 of Title 8, United States Code seeking a judicial declaration of plaintiff's citizenship as a United States citizen.

2. Plaintiff's mother, Madeline Montana, was born on October 2, 1890, at Jersey City, New Jersey, and has since that date continuously been a native and citizen of the United States of America, who has never surrendered or lost her citizenship, or expatriated herself.

57 3. Plaintiff's father, Joseph Montana, was born in Accera, Italy, and has been since his birth continuously a native and citizen of Italy.

4. Plaintiff was born on June 26, 1906, in Accera, Italy.

5. Plaintiff entered the United States of America on September 19, 1906 when he was approximately three months old, having been brought to the United States from Italy by his mother, Madeleine Montana.

6. Plaintiff has continuously resided in the United States since that time and has never been naturalized or otherwise declared by legally constituted authority to be a citizen of the United States.

Conclusions of Law

1. This court has jurisdiction over the parties to this action and the subject matter hereof.

2. Plaintiff's status as a citizen must be determined in accordance with the requirements of the law that was in effect at the time of his birth.

3. Plaintiff is not a citizen by virtue of any provision of the Constitution of the United States of America, having been born outside of the territorial limits of the United States.

4. Plaintiff is not a citizen by virtue of any statu-
58 tory enactment of the Congress of the United States of America, the relevant provision in effect at the

time of plaintiff's birth providing that United States citizenship only descended to a child born outside of the limits and jurisdiction of the United States through the child's father, no provision having been made for children born outside the limits and jurisdiction of the United States but whose mothers were.

5. Plaintiff has failed to sustain the burden of proving himself to be a citizen of the United States of America.

Enter:

/s/ J. H. Miner
Judge

Dated: Nov 20 1959

59 IN THE UNITED STATES DISTRICT COURT

• • (Caption—Civil No. 58 C 1620) • •

NOTICE

(Filed Dec 1 1959)

Notice Is Hereby Given that the plaintiff, Mauro John Montana, appeals to the United States Court of Appeals for the Seventh Circuit from the findings of fact, conclusions of law and judgment order entered by the court below on the 20th day of November, 1959. The attorney for the plaintiff, Mauro John Montana, is Anna R. Lavin, 209 South LaSalle Street, Chicago 4, Illinois. The attorney for the defendant, William Rogers, Attorney General of the United States, is Robert Tieken, 450 U. S. Court House, Chicago 4, Illinois.

/s/ Anna R. Lavin

Dated: December 1, 1959.

60-65 • • •

[fol. 41]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAURO JOHN MONTANA, Plaintiff,

vs.

WILLIAM ROGERS, Attorney General of the United States, Defendant.

COMPLAINT—Filed September 3, 1958

Now comes the plaintiff, Mauro John Montana, by his attorney, Anna R. Lavin, and complaining against the defendant William Rogers, as Attorney General of the United States, in complaining says:

1. The jurisdiction of this Court is invoked and these proceedings are instituted against the defendant under Section 1503 of Title 8 of the Nationality Act of 1952 (8 U. S. C. 1503, for a judgment declaring the plaintiff to be a citizen and national of the United States of America.

2. Defendant is the duly appointed, qualified and acting Attorney General of the United States. The Immigration and Nationality Service is a department of the defendant and under his direction and control.

3. Plaintiff is the true and lawful blood child of Maddelena Montana, who is a native born citizen of the United States.

4. Maddelena Montana was born in Jersey City, New Jersey, on the 2nd day of October, 1890 of Giovanni Mondano and Rose Mondano, his wife, both of whom were naturalized citizens of the United States at the time of [fol. 42] the birth of the said Maddelena Montana.

5. Maddelena Mondano has, since the 2nd day of October, 1890, to the present day, been continuously a resident of the United States.

6. On or about the 3rd day of January, 1905, the said Maddelena Mondano married one Giuseppe Montana in Bayonne, New Jersey.

7. The said Maddelena Montana journeyed to Italy on or about the 2nd day of February, 1906, accompanied by her husband and her parents as aforesaid. She departed from New York City in January of 1906, at which time she was already pregnant with said child and on February 2, 1906, when she arrived at Naples, Italy, her pregnancy was in the fifth month.

8. That approximately two months thereafter she attempted to return to the United States and was prevented from so doing by and through the actions of the then acting and duly constituted American Consul, the highest ranking United States official in the province of Naples, Italy, where she was visiting.

9. The prohibition of the aforesaid American Consul continued to, and included, approximately the 30th day of July, 1906.

10. That, theretofore, on, to-wit the 26th day of June, 1906, there was born to the said Maddelena Montana, at Acerra, Italy, a son, Mauro John Montana, the plaintiff herein.

11. That on or about the aforesaid 30th day of July, 1906, Maddelena Montana entered the United States traveling on a United States passport, recognizing her as a citizen [fol. 43] of the United States, accompanied by the plaintiff whose name and/or description was endorsed on the said United States passport.

12. That, from the 30th day of July, 1906, to the present, the plaintiff has never been without the continental limits of the United States.

13. That on the 1st day of August, 1924, and other times prior and subsequent thereto, the plaintiff had and has pledged allegiance to the United States of America and has renounced all foreign sovereigns, powers and potentates.

14. That on or about the 7th day of January, 1958, the plaintiff was served by the Immigration and Nationality Service with an order to show cause why he should not be deported which said order to show cause is incorporated and identified in immigration file No. A4 973-720.

15. That deportation hearing proceedings commenced on the 15th day of January, 1958; that, from the inception of that hearing, questions as to the jurisdiction of the hearing officials was raised and eventually affirmatively challenged with a demand for termination of said immigration proceedings because of the claimed United States citizenship of the plaintiff.

16. The plaintiff's demand for termination of the immigration proceedings seeking deportation, on the ground of want of jurisdiction because of his citizenship of the United States, was denied and the hearing proceeded, with the plaintiff refusing to take further part thereafter.

17. The plaintiff contends that the denial and refusal of [fol. 44] the Immigration and Nationality Service at Chicago, Illinois to terminate the deportation proceedings, on the ground that he was a citizen of the United States, is a denial of his right as a citizen of the United States. The plaintiff verily believes that the defendant intends to continue on with said deportation proceedings and will so do, unless restrained by an injunction of this Court.

18. Plaintiff Mauro John Montana is a permanent resident of the Village of La Grange, within the Northern District of Illinois and claims his permanent residence within the jurisdiction of this Court.

19. Plaintiff is a United States citizen, such citizenship having been acquired pursuant to the provisions of the 14th Amendment to the Constitution of the United States and Paragraph 9 of Article 1 of the Constitution of the United States and the laws and statutes enacted pursuant thereto.

20. Plaintiff has never performed any act, nor executed any instrument, of expatriation. Plaintiff is entitled to be declared a citizen and national of the United States.

Wherefore, plaintiff prays for the entry of a judgment and decree:

(a) Declaring him to be a citizen of the United States;

(b) That the proceedings identified as: "In the Matter of Mauro John Montana, Immigration and Nationality file No. A4 973 720", be declared null and void and of no effect;

(c) That the defendant, his agents, attorneys, and servants be restrained and enjoined from taking any action in respect of the proceedings described in Paragraph (b) hereinabove, until the further order of this Court; and

[fol. 45] (d) For such other and further relief as may be just and proper in the premises.

Anna R. Lavin, Attorney for Plaintiff, Mauro John Montana.

One North La Salle Street, Chicago 2, Illinois, RA 6-7855.

Duly sworn to by Mauro John Montana, jurat omitted in printing.

[fol. 46]

In the United States District Court
For the Northern District of Illinois
Eastern Division
No. 58 C 1620

Mauro John Montana, Plaintiff,

vs.

William Rogers, Attorney General of the United States, and Edward P. Ahrens, District Director of Immigration and Naturalization, Chicago, Illinois, Defendants.

Interrogatories—Filed March 17, 1959

The following Interrogatories are to be answered separately and fully in writing and under oath within fifteen days after the service hereof:

1. Please state the name and present address of the person who was United States Consul at Naples, Italy from January 1, 1906 to October 1, 1906.

2. Please state the name or names of any present or former employee or employees of the Immigration and Nationality Service, the Consular Service of the United States, and the State Department, who have knowledge and information regarding any passport, application or applications therefor, visa or visas, or application or applications [fol. 47] therefor by, or on behalf of Lena (Madeline) Montana (Mondano) and/or Mauro John Montana and/or any child of Lena (Madeline) Montana (Mondano) during the period commencing September 1, 1905 through and including October 1, 1906.

3. Please state when or on or about what date Certificate of Arrival (Department of Labor) #541860 relating to Mauro John Montana was composed, and the source of the information thereon and therefor.

4. Please state whether or not between the period beginning January 1, 1906 to October 1, 1906, a citizen of the United States required a Passport or other Travel Document to obtain transportation and to travel from Naples, Italy to the United States.

Anna R. Lavin, Attorney for Plaintiff, Mauro John Montana.

[fol. 48]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 58 C 1620

MAURO JOHN MONTANA, Plaintiff,

vs.

WILLIAM ROGERS, Attorney General of the United States, and EDWARD P. AHRENS, District Director of Immigration and Naturalization, Chicago, Illinois, Defendants.

Excerpts From Transcript of Proceedings

Transcript of Proceedings had in the above-entitled cause before the Honorable Julius H. Miner, one of the judges of said court, in his court room in the United States Court House at Chicago, Illinois, Friday, February 27, 1959, at 10:00 o'clock a.m.

APPEARANCES:

Miss Anna R. Lavin (Suite 1045, 209 S. LaSalle St., Chicago 4, Illinois), on behalf of Plaintiff.

Hon. Robert Tieken, United States Attorney, by Donald S. Manion, Esq., on behalf of Defendants.

And thereupon the following further proceedings were had herein:

[fol. 49] By the Clerk: 58 C 1620, Montana vs. Rogers.

By Miss Lavin: If it please your Honor, this is at this time a petition for temporary injunction pending the disposition of the case now pending before your Honor for a declaratory judgment of American citizenship. The petition for the restraining order alleges that on January 7, 1958, this plaintiff was served with an order to

show cause why he shouldn't be deported; that deportation proceedings commenced on the 15th day of January; that in the course of the deportation proceedings this man made an affirmative claim to American citizenship.

Subsequently, on the 29th day of August, again in 1958, a final order of deportation issued. On the 3rd day of September the suit that is now pending before your Honor was instituted in this court.

* * * * * * *

[fol. 50] By the Court: If I give the petitioner a limited time for discovery and for trial, would you agree to more time without an injunction?

By Mr. Manion: Your Honor, it is just a matter of a policy. May I say to the court that no action will be taken against Mr. Montana at all pending the determination of whatever this court has.

By the Court: That is all I want.

By Mr. Manion: We can't agree to that. We don't want to be in a position of agreeing to that.

By the Court: I will not issue the injunction against the Attorney General, but I will limit their time and I will set this case down for hearing within sixty days. They can go ahead with the discovery all they want, with all the preparation. Nothing is shown to me to indicate any need for the petitioner's own testimony except the oath of allegiance, and in that situation I don't think it makes any difference. Taking an oath wouldn't make him a citizen. [fol. 51] That is purely a matter of law.

I am not clear on whether or not any detention in Italy, physical loss, or anything else, would change the law at all and to strike the citizenship of the child born in Italy.

By Miss Lavin: Your Honor understands that while we do claim estoppel, we are proceeding on pure law in this case. We are not relying on simple estoppel. We think it is a consideration, but it is our position and very, a very carefully considered position that this man was under the law a citizen of the United States at the time he was born.

By the Court: In Italy?

By Miss Lavin: At the time he was born in Italy, yes, sir.

By the Court: Well, what is your theory?

By Miss Lavin: The theory is the carrying forward of the Act of 1802 unrepealed by the Act of 1855 which Mr. Manion read to you, and as a matter of fact, every place I have read carried forward not directly contradictory, under the further theory of the Act of 1897 when the citizen mother had domination of the child and resumed her resi-
[fol. 52] dence in the United States.

By the Court: Does that confer citizenship on the child?

By Miss Lavin: That was the theory of the Guest case.

By the Court: By the Act?

By Miss Lavin: Yes, physical domination.

By the Court: Can we reduce this now to the stipulated question of facts and briefs?

By Miss Lavin: Your Honor, I consider that the briefs are going to be extensive in this case and certainly are going to take up much more of the court's time than the trial of the issues.

What is your position on the situation?

By Mr. Manion: Oh, I think we can get together to stipulate to things, yes, ma'am.

By Miss Lavin: Well, isn't it entirely conceivable that if the government comes forward with what records the Department of State has, we might be in a better position to stipulate to everything.

By Mr. Manion: This is the first time I knew that you wanted any documents.

By Miss Lavin: Oh, no. I spoke to you about that in
[fol. 53] your office, Mr. Manion.

By Mr. Manion: I am sorry, I don't recollect that, if you did.

By Miss Lavin: I assure you, sir, I did.

By Mr. Manion: I don't remember that, but if you want the documents I would be delighted to try to obtain them for you.

By Miss Lavin: Fine. I will give you a copy of our request served on the Immigration, and that will expedite it.

By the Court: What will happen to the government's statement that it does not intend to take any action?

By Mr. Manion: Your Honor, can I further say that

after ..., the Immigration—this is not a country of barbaria..s. The man is sick and the Immigration and Naturalization service regardless, however they may be characterized by the plaintiff, they are still United States citizens. They are like other United States citizens. They are, I think, motivated primarily by a sense of justice.

By the Court: All right, I am accepting your assurances on the record.

I will deny the motion for a temporary injunction.

[fol. 54] By Miss Lavin: The restraining order expires on its own power today.

By the Court: I beg your pardon?

By Miss Lavin: The restraining order expires on its own power today. It was extended to today.

Would you make provisions for the return of this surety, security, that was put up during the pendency of that order?

By the Court: Yes, I will provide for that and I will set the matter down here in sixty days.

By the Clerk: April 27th?

By the Court: April 27th, at which time you may offer any proof that you wish and then further discuss the question of the law on the facts. I don't think I can ask the government to stipulate on any opposition to a return here in 1906.

By Miss Lavin: 1905, 5 and 6; it was 1906.

By the Court: Pardon?

By Mr. Manion: 1906.

By Miss Lavin: It was 1906.

By Mr. Manion: We have taken Mrs. Montana's deposition, your Honor.

[fol. 55] By the Court: You have taken it?

By Mr. Manion: We have taken it, and after reading that, I don't feel I would want to stipulate as to the circumstances surrounding Mrs. Montana. I would not want to.

By the Court: You couldn't stipulate. I would not ask you to.

By Mr. Manion: No, your Honor.

By the Court: That will be the order.

By Miss Lavin: The time for hearing, your Honor, is April 27th.

By the Clerk: April 27th.
By the Court: April 27th.
By Mr. Manion: Thank you, your Honor.

[fol. 56] By the Court: All you have to do is briefly state what you have told me. That is the law. I can't by any stretch of the imagination consider your point of view. To me, it is not retroactive.

It is very clear that the father is not a citizen, was [fol. 57] not a citizen at the time the child was born. There is no question about it in my mind. He isn't a citizen now.

By Mr. Manion: That is correct, your Honor.
By the Court: Submit it to Miss Lavin.
By the Clerk: Do you want to fix a date on that?
By the Court: Friday morning.

[fol. 58]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1959—April Session, 1960.

No. 12851

MAURO JOHN MONTANA, Plaintiff-Appellant,

v.

WILLIAM P. ROGERS, Attorney General of the United States, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION—April 29, 1960

Before Hastings, Chief Judge, Duffy and Knoch, Circuit Judges.

HASTINGS, *Chief Judge*. This declaratory judgment action was brought in the district court under the provisions of Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. 1503. Mauro John Montana, plaintiff-appellant (plaintiff), initiated this suit to determine his citizenship, a controversy having been precipitated by an administrative order for his deportation. William P. Rogers, Attorney General of the United States, is defendant-appellee.

The facts of the case are simple and not in dispute—plaintiff was born in Italy in 1906, the son of an alien father and a citizen mother. He claims he is a citizen of the United States. The application of the proper law to this factual situation is the controlling consideration before us. [fol. 59] The record reveals the following events. Maddelena Montana, mother of plaintiff, was born in Jersey City, New Jersey, in 1890. Her father was a naturalized American citizen. She lived in Jersey City until her marriage on August 26, 1905, to Guiseppe (Joe) Montana, father of plaintiff. Guiseppe Montana was born in Italy; prior to his marriage, he had resided in either Brooklyn, New York or Bayonne, New Jersey without acquiring citizenship status in the United States.

On the 15th or 16th day of January, 1906, Maddelena and Guiseppe Montana left the United States en route to Italy, where they arrived on February 2, 1906. The purpose of their trip was to join Maddelena's parents who were visiting relatives in Italy. At the time she departed from the United States, Maddelena Montana was about four months pregnant.

Maddelena, the sole witness in the declaratory judgment action under review (plaintiff's illness precluded his testifying; the government offered no evidence) testified as to these subsequent events. About a month and a half after arriving in Italy, Maddelena, wishing to return to the United States, accompanied her parents to a "little town" to obtain passports. Her parents secured their passports, but the official on duty was unable to find her name. He informed Maddelena that she must see the American Consul to get her passport. Two or three days later Maddelena and her mother traveled to the American Consulate

in Naples. According to her testimony, Maddelena said, "I want to go back to the United States and [the Consul] just took one look at me and he says, 'I am sorry, Mrs., you cannot go in that condition * * *. You come back after you get your baby.'" After this visit to the American Consulate Maddelena went to Acerra, Italy where she resided with her mother and where the plaintiff was born on June 26, 1906.

In late March or early April, 1906, Guiseppe Montana had returned to the United States. Maddelena stated that at this time they "were on the outs. We were not talking."

After the birth of plaintiff, Maddelena returned to the American Consul from whom she secured a passport. She stated she had "not much" conversation with the Consul, but "asked him about my baby's passport, and he said, 'You don't need it. It is in your own passport.'" [fol. 60]. Maddelena, with plaintiff and his grandmother, then returned to the United States. The records of the Immigration Service produced at the trial reveal that plaintiff (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother and alien grandmother.

After arrival in this country, plaintiff lived for three months with Maddelena and her parents. Thereafter, until his marriage in 1927, he lived with both parents who had become reconciled. After his marriage, and continuing to date, plaintiff has resided with his own family in the Chicago, Illinois, area. At no time has he instituted naturalization proceedings.

On January 7, 1958, plaintiff was served by the Immigration and Nationality Service with an order to show cause why he should not be deported. After an administrative hearing, an order directing his deportation became final on August 29, 1958. On September 3, 1958, plaintiff commenced the instant declaratory judgment action to define his citizenship status, to declare the deportation proceedings null and void, and to restrain defendant from taking any action on the basis of such proceedings.

In action relevant to this appeal, the district court, after a trial on the merits, entered judgment in favor of de-

fendant and dismissed the complaint, from which judgment this appeal is taken.

On the basis of the described facts, plaintiff offers six theories which he contends establish his citizenship. His central argument revolves around the applicable statutory law in existence at the time of his birth. Plaintiff asserts that he became a citizen at birth by the operation of Section 2172 of the Revised Statutes of the United States.[1] The Attorney General contends that Section 1993 of the Revised Statutes[2] exclusively and precisely controls the [fol. 61] factual situation in question here and that citizenship under that section can be conferred to a child born abroad *only if the father was a citizen.*

Both Sections 2172 and 1993 were enacted as a part of the Act of June 20, 1874, 18 Stat. ch. 333, a comprehensive codification of all laws (including existing nationality statutes) which repealed prior laws. No other relevant statutes were enacted prior to plaintiff's birth in 1906. Section 2172, as enacted, was substantially identical to Section 4 of the Act of 1802, 2 Stat. 155 (see 8 U.S.C.A. §§ 1-18, Historical Note). Section 1993 reenacted the Citizenship Act of 1855, 10 Stat. 604.

Congress had passed the Act of 1855 in response to an article by Mr. Horace Binney in 2 American Law Reports (1854) in which Mr. Binney declared that the Act of 1802 was retrospective in application; that the phrase "children of persons who now are, or have been, citizens of the United States" is operative *only* to persons born prior to

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[1] Section 2172, Rev. Stat. § 2172 (1875), provided in relevant part:

> "• • • and *the children of persons who now are, or have been, citizens of the United States*, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens • • •." (Emphasis added.)

[2] Section 1993, Rev. Stat. § 1993 (1875), provided:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, *whose fathers were* and may be at the time of their birth, *citizens* thereof, are declared to be citizens of the United States; but rights of citizenship shall not descend to children whose fathers never resided in the United States." (Emphasis added.)

the Act of 1802; and that there were no operative statutes covering similar situations subsequent to 1802. The Act of 1855 remedied that defect. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 665, 673, 674 (1898); *Weedin* v. *Chin Bow*, 274 U.S. 657, 663, 664 (1927). That statute provided that persons "*heretofore or hereafter*" born abroad of *citizen fathers* (when such fathers had resided in the United States) were declared to be citizens of the United States. This Act expressly operated retrospectively and prospectively, but no repealer of the Act of 1802 was provided.

This provision was reenacted by the Act of 1874 and appeared as Section 1993 of the Revised Statutes. It expressly applied prospectively and retrospectively. However, plaintiff contends that Section 2172, reenacted concurrently, operated prospectively and is the basis for declaring his citizenship.[3] It is true that Section 2172 was not expressly limited to certain factual situations in point of time prior to 1802. The lack of such limiting language may have been due to inadvertence. It may have been enacted to apply to situations between 1802 and 1855. Cf. [fol. 62] *Wong Kim Ark*, 169 U.S. at page 674. It may have been reenacted merely to save rights of citizenship which accrued prior to 1802.

In any event, considering both sections of the Act of 1874, we hold that Section 1993 applies exclusively to the factual situation before us. Since plaintiff's father was not a citizen of the United States, no rights of citizenship descended to plaintiff at birth. This determination is consistent with the holdings in *Mock Gum Ying* v. *Cahill*, 9 Cir., 81 F. 2d 940 (1936); and *Anthony D'Alessio* v. *John M. Lehman, District Director of Immigration and Naturalization Service*, N.D.D.C. Ohio, —— F. Supp. —— (Feb. 26, 1960).

Plaintiff advances other theories of citizenship based on statutory grounds. They can be rejected summarily. Plaintiff argues that citizenship vested in him under Section

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[3] Plaintiff construes the provision "the children of persons" to apply in the distributive and not to require both parents to be citizens; and "now are or have been * * * born" to operate both prospectively and retrospectively.

1993, *supra*, since at birth he was in the sole custody of his mother (his father having returned to the United States). However, the Department of State ruling he relies upon relates to illegitimate children who do not have a father in contemplation of law. In addition, plaintiff argues that Section 1 of the Act of 1934, 48 Stat. 797, (which grants citizenship to infants born abroad to either a citizen father *or* mother) is prospective and retrospective in operation and that it is merely declaratory of existing law. But an examination of this section reveals that it is expressly limited in its operation to children "hereafter born" abroad. Finally, plaintiff argues that he gained citizenship by the terms of Sections 3 and 5 of the Act of March 2, 1907, 34 Stat. 1228, 1229. This act denationalized American women who married aliens and provided that minor children born abroad of such alien parents should be deemed citizens of the United States upon the resumption of American citizenship by the mother. However, in this case plaintiff's mother never lost her citizenship, and there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization. See *In re Wright*, E.D.D.C.-Pa., 19 F. Supp. 224 (1937).

Plaintiff has advanced a novel constitutional argument that Fourteenth Amendment rights of citizenship attach at the moment of conception and that since plaintiff was conceived in the United States, he is a citizen. Whatever [fol. 63] rights might accrue to an unborn child by the operation of the common law and by statute, it is clear that the Fourteenth Amendment limits citizenship to persons "*born* * * * in the United States."

Further, the action of the American Consul in Naples (even if one is fully to believe Maddelena) in refusing to issue a passport is not sufficient, as a matter of law, to grant citizenship to plaintiff. The cases cited by plaintiff relate to native-born citizens; the issues there were voluntary expatriation. These holdings do not control the situation before us. See *Dos Reis* v. *Nicolls*, 1 Cir., 161 F. 2d 860 (1947); and *Podea* v. *Acheson*, 2 Cir., 179 F. 2d 306 (1950).

Finally, even if the action of Immigration officials (the record of such action was introduced at trial) was suffi-

cient to establish a *prima facie* case of plaintiff's citizenship, it was rebutted convincingly by the showing that the Immigration officers committed legal error in designating plaintiff as a citizen at the time of his entry. See *Lee Hon Lung* v. *Dulles*, 9 Cir., 261 F. 2d 719 (1958); and *Delmore* v. *Brownell*, 3 Cir., 236 F. 2d 598 (1956). Such designation of plaintiff's citizenship was neither the formal adjudication in *Lung* nor the considered determination in *Delmore*.

The judgment of the district court is

Affirmed.

[fol. 64]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12851

MAURO JOHN MONTANA, Plaintiff-Appellant,

vs.

WILLIAM P. ROGERS, Attorney General of the United States, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT—April 29, 1960

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

[fol. 65]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—May 26, 1960

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fol. 66] Clerk's Certificate (omitted in printing).

[fol. 67]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—October 17, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 198

MAURO JOHN MONTANA,

Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

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MAURO JOHN MONTANA,

Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, Mauro John Montana, prays that a writ of certiorari be issued to review the decision and judgment order of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The order of the United States District Court for the Northern District of Illinois, Eastern Division, entering judgment in favor of the respondent, William P. Rogers and dismissing the amended complaint was entered on November 20, 1959, and is not reported. The Court's findings of fact and conclusions of law are reproduced in the certified record transmitted herewith. (R. 56-68).

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the District Court was filed April 29, 1960, and is not yet reported, but is set forth in Appendix B *infra*. Petition for Rehearing filed by the petitioner was denied on May 26, 1960. It, also, is set forth in Appendix B *infra*.

On May 31, 1960, the United States Court of Appeals, for the Seventh Circuit, on motion of this petitioner made pursuant to Rule 28 of that Court, stayed the issuance of its mandate to and including the 30th day of June, 1960, for the purpose of allowing said petitioner to petition this Court for certiorari. A copy of said order is contained in Appendix B *infra*.

JURISDICTION.

This petition is filed within ninety days of the denial of the Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Is this petitioner, born in Italy in 1906 of a native born American mother and an alien father within the definition of "the children of persons who now are, or have been, citizens of the United States," so as to be considered a citizen though born out of the limits and jurisdiction of the United States under the provisions of § 2172 of the Revised Statutes of 1874?

2. Does the overlapping of subject matter of § 2172 (concerning derivation of citizenship of foreign born children of citizen persons), and 1993 (concerning derivation of citizenship to foreign born children of citizen fathers), of the Revised Statutes of 1874, simultaneously

enacted, require abandonment of the one in favor of the other without attempt at reconciliation? Indeed, does the law allow such abandonment?

3. Does the word "now" in Section 2172, in the absence of express limitation, require interpretation as of the time of enactment, when the same word in other statutes has received the interpretation of "now" as of the time when specified statutory conditions arise or are found to exist?

4. Does not the rule that all facts and law be construed in favor of claims to citizenship require adoption of the latter interpretation?

5. May rights of citizenship be destroyed by an ambiguity, which ambiguity is recognized in the decision of the United States Court of Appeals?

6. Can the law of citizenship be so interpreted that a naturalized mother or expatriated mother, who resumed citizenship, passes greater rights to her foreign born child, than does a citizen mother who never lost her citizenship?

7. Can a statute reenacted in June 22, 1874, as a part of the laws then in force reasonably be interpreted to apply only to persons born before April 14, 1802?

8. Should not a court exercise its equitable powers to rectify the frustration by a consular official of the desire and attempt of petitioner's mother to return to the United States before the birth of petitioner, and translate that desire and attempt into fact?

STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix A, *infra*, pp. 1a-3a.

STATEMENT OF THE CASE.

This declaratory judgment action was brought under the provisions of Section 360 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1503). The petitioner initiated the suit to determine his citizenship, a controversy having been precipitated by an administrative order directing his deportation. William P. Rogers, Attorney General of the United States, is the respondent as the head of the administrative agency issuing the order.

Petitioner was born in Italy on June 26, 1906. His mother, Maddelena Montana, was born in Jersey City, New Jersey, in 1890. Her father was a naturalized American citizen. She lived in Jersey City until her marriage on August 26, 1905, to Guiseppe (Joe) Montana, father of petitioner. Guiseppe Montana was born in Italy. Prior to his marriage, he had resided in either Brooklyn, New York or Bayonne, New Jersey without acquiring citizenship status in the United States.

On the 15th or 16th day of January, 1906, Maddelena and Guiseppe Montana left the United States en route to Italy, where they arrived on February 2, 1906. The purpose of their trip was to join Maddelena's parents who were visiting relatives in Italy. At the time she departed from the United States, Maddelena Montana was about four months preghant.

About a month and a half after arriving in Italy, Maddelena, wishing to return to the United States, accompanied her parents to a "little town" to obtain passports. Her parents secured their passports, but the official on duty was unable to find her name. He informed Maddelena that she must see the American Con-

sul to get her passport. Two or three days later Maddelena and her mother traveled to the American Consulate in Naples. According to her testimony, Maddelena said, "I want to go back to the United States and [the Consul] just took one look at me and he says, 'I am sorry, Mrs., you cannot go in that condition • • •. You come back after you get your baby.'" After this visit to the American Consulate Maddelena went to Acerra, Italy where she resided with her mother and where the petitioner was born on June 26, 1906.

In late March or early April, 1906, Guiseppe Montana had returned to the United States. Maddelena stated that at this time they "were on the outs. We were not talking."

After the birth of petitioner, Maddelena returned to the American Consul from whom she secured a passport. She stated she had "not much" conversation with the Consul, but "asked him about my baby's passport, and he said, 'You don't need it. It is in your own passport.'"

Maddelena, with petitioner and his grandmother, then returned to the United States. The records of the Immigration Service produced at the trial reveal that petitioner (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother and alien grandmother.

After arrival in this country, petitioner lived for three months with Maddelena and her parents. Thereafter, until his marriage in 1927, he lived with both parents who had become reconciled. After his marriage, and continuing to date, petitioner has resided with his own family in the Chicago, Illinois, area.

On January 7, 1958, petitioner was served by the Immigration and Nationality Service with an order to show

cause why he should not be deported. After an administrative hearing, an order directing his deportation became final on August 29, 1958. On September 3, 1958, petitioner commenced the instant declaratory judgment action to define his citizenship status, to declare the deportation proceedings null and void, and to restrain respondent from taking any action on the basis of such proceedings.

The district court, after a trial on the merits, entered judgment in favor of respondent and dismissed the complaint. Appeal was taken to the United States Court of Appeals for the Seventh Circuit. (R. 60).

On April 29, 1960, the said Court of Appeals affirmed the judgment of the District Court, holding that Section 1993 of the Act of 1874 applies exclusively to the instant facts; that since petitioner's father was not a citizen of the United States, no rights of citizenship descended to petitioner at birth; that since petitioner's mother never lost her citizenship, there could be no later resumption of citizenship by which petitioner could claim a derivative naturalization; that no rights of citizenship could accrue to a child under the Fourteenth Amendment by the fact of conception in the United States. (Appendix B, pp. 4a-6a).

REASONS FOR GRANTING THE WRIT.

This Court should exercise its jurisdiction in this case for the following reasons:

1. There is involved herein an important question concerning citizenship, and whether two statutes, legislating on the same issue of derivative citizenship, reenacted simultaneously, can arbitrarily be given a construction whereby one is employed to the exclusion of the other.

2. There is involved herein an important question concerning the interpretation of statutory language applicable to the large class of persons residing in this country, who were born out of the jurisdictional limits of native born citizen mothers between 1874 and 1934. All decisions adverse to such persons, including the decision here sought to be reviewed, are bottomed on an apparent approval of such interpretation by this Court in two cases (*United States* v. *Wong Kim Ark*, 169 U.S. 649; *Weedin* v. *Chin Bow*, 274 U.S. 657), wherein such interpretation was not an issue and neither necessary nor proper to the result. It is eminently and tremendously important that the citizenship status of such persons be determined on nothing less than a direct decision by this Court, after full presentation and argument in a controversy where such status is the issue.

3. It is hereby prayed that this Court review a decision that so interprets the acts of March 2, 1907 and May 24, 1934, that a repatriated and/or a naturalized maternal parent has greater rights in passing citizenship to her minor children than does a native born maternal parent, who never lost United States citizenship.

4. The decision of the United States Court of Appeals for the Seventh Circuit, as it applies the resumption of citizenship statutes to native-born citizen mothers, is in direct conflict with the decision of the District Court of Minnesota in *Petition of Black*, 64 F. Supp. 518 and with the opinion of the Attorney General in *Matter of de Coll*, 37 Op. A. G. 90.

I.

Petitioner contends he was a citizen of the United States, when he was born in 1906 of a United States citizen mother and an alien father. His contention is based on the requirement that effect must be given to the plain words of Section 2172 of the Act of 1874;

> ". . . the children of persons who now are, or have been, citizens of the United States, shall though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; . . ." (Appendix A, p. 1a).

Section 2172 of the Act of 1874 is a substantial reenactment of the Act of April 14, 1802, except that the following proviso was admitted at the time of reenactment.

> "Provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States: . . ." (Appendix A, p. 1a).

Simultaneous with the reenactment of the aforedescribed statute in 1874, the Act of 1855 was also reaffirmed as Section 1993 of the Act of 1874;

> "All children heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

It is the holding of the United States Court of Appeals for the Seventh Circuit, "that Section 1993 applies exclusively to the case before us," that "Since plaintiff's father was not a citizen of the United States, no rights of citizenship descended to plaintiff at birth." (Appendix B, p. 8a).

That decision finds its strongest predicate in the word "now" as it appears in Section 2172 of the Act of 1874. The interpretation finds its source in an article by Mr. Horace Binney in 2 American Law Reports (1854) in which Mr. Binney opined that the Act of 1802 was retrospective in application, and that the phrase "children of persons who are now, or have been, citizens of the United States" is operative *only* to persons born prior to the Act of 1802. Binney's interpretation impresses upon the act an intent of the Congress to limit its operation to persons who were or had been citizens prior to 1802 and to leave children born abroad of American citizens after 1802 unprovided for. It is petitioner's contention that this interpretation is not made conclusive by the fortuitous circumstance that Mr. Binney was the only writer to have remarked on the statutory provision, that his singleness of interest is no basis for over-riding all basic tenets of statutory construction, the starting-post being that all facts and law should be construed as far as is reasonably possible in favor of the claimant's citizenship. *Boyd* v. *Nebraska*, 143 U.S. 145.

Mr. Binney's contention for retrospective application of the statute is made in the face of the very strong legal presumption that a statute is not meant to act retrospectively, and that it ought never to receive such a construction unless it is susceptible of no other. The presumption is that a statute will never be so construed unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. *U. S. Fidelity* v. *U. S. for Use and Benefit of Struthers Wells Co.*, 209 U.S. 306; *U. S.* v. *St. Louis, San Francisco and Texas Ry. Co.*, 270 U.S. 1. Certainly there is nothing in the legislative history that compels rebuttal

of the presumption. The Act of 1802 was the repealer of the hated Alien and Sedition laws, the so-called Nationality Act of 1798, it was the Jeffersonian measure designed to replace the Alien and Sedition laws with a *liberal* nationality and naturalization law. Logic requires that we do not attribute to the Jeffersonians a replacement that spoke only as of April 14, 1802, with no provision for the future. We submit that the real or implied intention of Congress does not require retrospective operation. Even Mr. Binney, who contended for the interpretation, admitted he was not able to imagine any plausible political reason for it. (274 U.S. 657, 663).

The other alternative for support of Mr. Binney is that "now" is a word so strong, clear and imperative that it always and invariably means at the present time, that is, at the time of the enactment of the Act of 1802. It is our submission that the statute does not meet the test. There is ample authority for statutory construction of the word "now" relating to a time contemporaneous with satisfaction of the provisions of the Act. See *Protest of Chicago, R. I. & P. Ry. Co.*, 137 Okla. 186; *State* v. *City of St. Lawrence*, 101 Kan. 225; *Thompson* v. *Board of Commissioners of Reno County*, 127 Kans. 863; *Worthen* v. *Burgess*, 273 Mass. 437, *Board* v. *Smith*, 22 Ky. 430; *City of St. Louis* v. *Dorr*, 144 Mo. 466; *Clark* v. *Lord*, 20 Kans. 390; *Tillamook City* v. *Tillamook County Court*, 56 Ore. 112. It is our submission, in accordance with such approved interpretation of the word that "now" means as of the time when any citizenship case arises—that is, the statute speaks as of the time when any person who is a United States citizen has a child born abroad.

The Court of Appeals, by its decision, guilelessly reaffirms the construction for which we contend, wherein it

provides "It is true that Section 2172 was not expressly limited to certain factual situations in period of time prior to 1802." (Appendix B, p. 8a). If it is not expressly limited, then the direction of retrospective operation is not so strong, clear and imperative as to overcome the strong presumption of prospective operation.

The Court of Appeals, nonetheless, relies on certain apparent concurrences by this Court in Mr. Binney's conclusions, as divorced from the reasons for his conclusions. These concurrences are gleaned from *U. S.* v. *Wong Kim Ark*, 169 U.S. 649 and *Weedin* v. *Chin Bow*, 274 U.S. 657.

Wong Kim Ark presented a single question of whether a child born in the United States of alien, resident parents, became at the time of his birth a citizen of the United States. The decision was that, by virtue of the Fourteenth Amendment, he did. Thus was presented an issue and decision wholly distinct from the cause at bar. In *Weedin* v. *Chin Bow, supra,* the issue was presented as to whether citizenship descended to the grandchild of a native born citizen, when the father of the child had never been in the United States prior to the child's birth. *Chin Bow,* in urging certain language in the *Wong Kim Ark* case in support of his position, was met with the retort that "It is very clear that the exact meaning upon the point here at issue was not before the court." (p. 671). We adopt the retort in respect of *Wong Kim Ark* and *Chin Bow* as they were advanced in the instant case. We respectfully submit that rights of citizenship are not to be so casually obliterated as to rely exclusively on language advanced in both instances to demonstrate a wholly separate point, that the questions here involved are of a dignity and importance meriting individual consideration by this Court.

Further difficulty is evidenced by the decision of the Court of Appeals for the Seventh Circuit in trying to reconcile Mr. Binney's interpretation of retrospective application of the Act of 1802 with reenactment of substantially the same statute in 1874. Explanation is given in three alternatives, an implicit recognition of statutory ambiguity, or tribiguity. Before proceeding thereto, it is well to remember the admonition of this Court, in *Perkins* v. *Elg*, 307 U.S. 325 at 337 that "Rights of citizenship are not to be destroyed by an ambiguity."

Recognizing a lack of any express limitation on the operation of Section 2172 in the Act of 1874, the Seventh Circuit opined that "The lack of such limiting language may have been due to inadvertence." (Appendix B, p. 8a). But this is contrary to the presumption that in construing a statute everything has been expressed which was intended, (*Ester* v. *Centennial Board of Finance*, 94 U.S. 500), and is in effect an amendment to this statute.

The second alternative advanced is that "It may have been enacted to apply to situations between 1802 and 1855." (Appendix B, p. 8a). Thus, the Seventh Circuit impresses upon the Act of 1802, as reenacted, prospective application contrary to the rationale upon which this cause was found against your petitioner.

The third alternative is that "It may have been reenacted merely to save rights of citizenship which accrued prior to 1802." (Appendix B, p. 8a). This concurs with the opinion in *Ying* v. *Cahill*, 9th Cir., 81 F. 2d 940, that "now" means April 14, 1802 (p. 943). But this is directly contradictory of the announced intention and object of the Act of 1874 to revise, simply, arrange and consolidate all statutes of the United States *in force* as of June 22, 1874.

The Seventh Circuit opinion continues that "In any event, considering both sections of the Act of 1874, Section 1993 applies exclusively to the factual situation before us." (Appendix B, p. 8a). Thus the court chose to enforce one of two statutes enacted simultaneously and pertaining to the same subject to the total exclusion of the other, though there is no express nor implied suggestion by the legislature to overcome the rule of statutory construction that in such circumstances, the statutes must be treated as mutually operative. *Pen-Ken Gas and Oil Corporation* v. *Warfield Gas Company*, 6 Cir., 137 F. 2d 871, 881.

There are other considerations and rules of statutory construction which militate against the decision entered by the Seventh Circuit in this cause. First, the courts are obliged to consider equity and good conscience in construing doubtful statutes. *Dinkins et al.* v. *Cornish*, E. D. Ark., 41 F. 2d 766, 767. Certainly equity and good conscience rebel at this form of expatriation of a man who has spent the 54 years of his life, save the first few months, in this country, whose physiognomy, demeanor, comportment and language identify him as an American, whose wife and four children, as well as he, know no other country. Further, a statutory construction must not be adopted, the effect of which is to produce inequality and injustice. *Greer* v. *Kinnan*, 8 Cir., 64 F. 2d 605, 607. The present interpretation gives to men as a class greater political rights than to women as a class.

Even more violative of our instinctive resistance to evidences of inequality and unreasoned discrimination is the effect given the Acts of 1907 and 1934 as it applies to the instant cause, a matter treated in the section next ensuing.

II.

In 1907, provision was made for the naturalization of foreign born children of naturalized parents, and of parents who resumed citizenship. Such provision has been found declaratory of the common law. *Petition of Drysdale*, D.C. Mich., 20 F. 2d 957, 958. "Resumed" can only apply to expatriated mothers. "Naturalized" has been judicially determined to refer to either parent. No provision was made for naturalization of a foreign born child of a citizen mother. The necessary inference is that such a child required no provision, that he was a natural born citizen under § 2172, *supra*. Otherwise a naturalized or an expatriated mother who resumed citizenship was, by law, endowed with greater political rights and with power to pass greater rights than a native born mother who never lost her citizenship.

It was urged upon the Seventh Circuit as an alternative and to the District Court for the Northern District of Illinois that, during Mrs. Montana's visit to Italy, it should be considered that her citizenship was in abeyance pending her return to the United States, and that, thus, upon her resumption of residence, petitioner became a citizen under the provisions of Section 5 of the Act of March 2, 1907;

> "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the . . . resumption of American citizenship by the *parent:* Provided, that such . . . resumption takes place during the minority of such child: And provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States." (Appendix A, p. 2a).

As a second alternative, it was submitted to the said courts that petitioner became a citizen by the clear opera-

tion of the Act of May 24, 1934 five years after his entry into the United States in 1906. The application of this statute passed twenty-eight years after his birth finds its justification in the comments of the Senate reporting committee:

> "Section 2 clarifies the present uncertainties of the law so that naturalization of an alien mother will confer citizenship upon her minor children born abroad who are admitted for permanent residence. The present law appears to confer citizenship upon such children but the uncertainty in the law makes necessary the clarifying language of the present bill." *U. S. ex rel Guest* v. *Perkins*, D.C. D.C., 17 F. Supp. 177, 181.

The language was *clarified* to read:

> "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of . . . resumption of American citizenship by the father or the mother: Provided, that such . . . resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States." (Appendix A, p. 3a).

The Court of Appeals for the Seventh Circuit rejected the dual alternatives holding that ". . . in this case plaintiff's mother never lost her citizenship, and there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization." (Appendix B, p. 9a). This holding is directly inapposite to the rationale of *Petition of Black*, D. Minn., 64 F. Supp., 518, which held:

> ". . . It is difficult to believe, therefore, that, under these circumstances, Congress intended, by the passage

of the Act of September 22, 1922, to render the citizenship rights of a child born to a marriage after that date less favorable than they would have been if the mother had married prior to September 22, 1922. While Mrs. Black could not become naturalized in judicial proceedings and thereby bestow citizenship rights upon her alien child because she had never lost her American citizenship, she could, however, to all practical purposes, resume her American citizenship by returning permanently to the United States and terminating the marriage relationship with her alien husband. Whether, under these circumstances, the resumption of citizenship is termed "fictional" or "real" is of no particular significance. Congress intended that when a mother or father of an alien minor child became an American citizen and the child returned to this country for permanent residence, then the rights of American citizenship should be conferred on the minor child as provided in the Act of May 24, 1934. No sound reason is suggested why any distinction should be made for citizenship purposes under this statute between the mother of an alien child becoming an American citizen, and the mother, a citizen, returning to the United States during the minority of the child for permanent residence and terminating the marriage with the alien father. Here, the factual situation meets every requirement of the statute. The child was born an alien. The mother remained a citizen and freed herself from the bonds of marriage with the alien father by returning to this country for permanent residence and obtaining a divorce. The child has permanently resided here for over five years. The resumption of American citizenship by the mother under these circumstances is just as real and effective within the intent of the Act of May 24, 1934, as if she had been married prior to September 22, 1922. Certainly her status as an American citizen, insofar as that would bestow rights upon the minor child is concerned, was the same. It seems clear, therefore, that the factual basis which Congress contemplated as a condition precedent to the

granting of citizenship to an alien minor child has been fully attained. To hold otherwise would be to unduly emphasize form rather than substance . . ." *Petition of Black*, 64 F. Supp. 518, 520-521.

Similarly in 37 Op. A. Ct. 90, William D. Mitchell, then Attorney General, held a foreign born child, Fernando Coll y Picard, to have derived citizenship through its citizen mother even though she had never lost her citizenship. The opinion held that so far as the citizenship of her child is concerned, Mrs. de Coll should be treated as precisely in the same situation as one who had resumed her citizenship.

It is recognized that a certain emphasis is placed on the dissolution of the marriage in the *Black* case. We submit such emphasis is occasioned by the factual circumstances of that case. It is certainly not occasioned by a clear and plain reading of Section 5 of the Act of May 24, 1934, under which it was decided. In any event, it cannot be denied that in the case of a widowed or divorced mother the citizenship of the minors in her custody would follow her citizenship. The contention here is that petitioner did acquire American citizenship by virtue of his mother's nationality and resumption of residence even though his father was then living and in the absence of any decree or arrangement that his mother should have the custody of him. To a similar contention the District Court of the District of Columbia admitted that the "answer to that is not without some doubt." *Kletter* v. *Dulles*, 111 F. Supp. 593, 597. There is no basis in law or reason where all other facts including custody, residence and separation are the same, excepting absolute divorce or death, there should not be equal and like derivation of citizenship.

Further, in, *In the Matter of Owen*, 36 Op. A. G. 197 and in *Petition of Drysdale*, D.C. Mich. 20 F. 2d 957, the native born mothers respectively were naturalized and resumed their American citizenship many years before the deaths of their alien husbands. It seems clear enough that neither child derived citizenship through the deaths of their alien fathers. It had to be through the resumption or naturalization of their mothers, which occurred while both parents were living and residing together in the marital relationship. Similarly, in *U. S. ex rel. Guest v. Perkins*, D.C.D.C., 17 F. Supp. 177, the child's native born mother and his alien father had separated by mutual consent under an agreement in which the custody of the child was given the mother. It was held that the child derived United States citizenship when the mother resumed citizenship.

Does it not offend against, not only equity and good conscience, but common sense, that a child of Prussian parents, all born in Prussia, should be recognized as an American citizen because his later widowed Prussian mother married a naturalized citizen, whereas, this petitioner, the child of a native born citizen and of resident parents, who knows nothing of Italy, its people, its language, its customs, should be considered a citizen and subject of Italy? Compare *U. S. v. Kellar*, C.C. Ill. 13 F. 82.

It is incongruous that persons who derived their citizenship by express mandate of the Constitution, without implementing statute, should be in a position less favorable than those governed by the fluctuating dispositions of Congress.

III.

Briefly the petitioner was born on June 20, 1906. Under commonly accepted concepts he was conceived in mid-September of 1905. His mother left the United States in January, 1906, then four months pregnant. In March, when six months pregnant, the consul refused to allow her, and her unborn child to return to the United States, the place of her nationality and domicile. Until subsequent to his birth, he was prohibited from entering the United States. It was our submission to the lower courts that the rights of the petitioner were seriously impinged upon by an officer of the United States, and that the Courts of the United States should act to rectify the wrong; that this petitioner, having been conceived in the United States should be considered in being from the time of conception.

It was, and is, our submission that the Courts have been consistent and assiduous in rectifying such errors and in translating desire and attempt, wrongfully frustrated by a government official, into fact. Illustratively, we refer the Court to *Dos Reis ex rel. Camara* v. *Nichols*, 1 Cir., 161 F. 2d 860 where the native born Camara, living in the Azores, got his draft notice into the Portuguese Army. Someone at the American consulate told him that if he wanted to join the American Army and avoid service in the Portuguese Army, he should return to America, which he was without means to do. To an administrative determination that he had expatriated himself by service in the Portuguese Army, the Court made a finding that such service was involuntary and under duress and that he was still a citizen of the United States. In *Podea* v. *Acheson*, 2 Cir., 179 F. 2d 306, the application of the native born Podea for a passport was denied on the ground that Podea's citizenship was renounced when his father registered as a Roumanian. The Court found that

the State Department's erroneous refusal of a passport led to Podea's being compelled to serve in the Roumanian Army. The Court of Appeals for the Seventh Circuit itself, has held that "Certainly, the Government should not be heard to content that a plaintiff has been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or wilfully prevented his doing . . ." *Lee You Fee v. Dulles*, 236 F. 2d 885, 887.

The Board of Immigration Appeals, too, has recognized the intrinsic fairness of rectifying technical losses of citizenship resulting from incorrect information from an American Consular Officer. In the Matter of S, Int. Dec. 974, File A-11537371. There can remain little doubt that a consul's refusal to issue a passport to persons seeking to return to the United States is a denial of a right or privilege as a citizen of the United States. *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753. However, the Seventh Circuit found "the action of the American Consul in Naples . . . not sufficient as a matter of law, to grant citizenship to plaintiff. The cases cited by plaintiff relate to native born citizens: the issues there were voluntary expatriation. These holdings do not control the situation here." (Appendix B, p. 9a). The basis for the decision is without merit. *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753; *Lee Bang Hong* v. *Acheson*, D. Hawaii, 110 F. Supp. 49, 50; *Lee Hong* v. *Acheson*, D.C. Cal., 110 F. Supp. 60.

CONCLUSION.

Wherefore, for foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANNA R. LAVIN,
Attorney for petitioner

APPENDIX A.

ACT OF 1874.

"Sec. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed."

ACT OF 1802.

"Sec. 4, And be it further enacted, That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided that no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great

Britain, during the late war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the state in which such person was proscribed."

ACT OF 1874.

"Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were and may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

ACT OF MARCH 2, 1907.

"Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

"Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: Provided, That such naturalization or resumption takes place during the minority of such child: And Provided further, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

ACT OF MAY 24, 1934.

(48 Stat. L., Part 1, 797)

An Act to amend the law relative to citizenship and naturalization, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1993 of the Revised Statutes is amended to read as follows:

"Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

Sec. 2. Section 5 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad", approved March 2, 1907, as amended, is amended to read as follows:

"Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: Provided, That such naturalization or resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

APPENDIX B.

SEPTEMBER TERM, 1959—APRIL SESSION, 1960.

No. 12851

MAURO JOHN MONTANA,
Plaintiff-Appellant.
v.
WILLIAM P. ROGERS, Attorney General of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 29, 1960

Before HASTINGS, *Chief Judge*, DUFFY and KNOCH, *Circuit Judges.*

HASTINGS, *Chief Judge.* This declaratory judgment action was brought in the district court under the provisions of Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1503. Mauro John Montana, plaintiff-appellant (plaintiff), initiated this suit to determine his citizenship, a controversy having been precipitated by an administrative order for his deportation. William P. Rogers, Attorney General of the United States, is defendant-appellee.

The facts of the case are simple and not in dispute—plaintiff was born in Italy in 1906, the son of an alien father and a citizen mother. He claims he is a citizen of the United States. The application of the proper law to this factual situation is the controlling consideration before us.

The record reveals the following events. Maddelena Montana, mother of plaintiff, was born in Jersey City,

New Jersey, in 1890. Her father was a naturalized American citizen. She lived in Jersey City until her marriage on August 26, 1905, to Guiseppe (Joe) Montana, father of plaintiff. Guiseppe Montana was born in Italy; prior to his marriage, he had resided in either Brooklyn, New York or Bayonne, New Jersey without acquiring citizenship status in the United States.

On the 15th or 16th day of January, 1906, Maddelena and Guiseppe Montana left the United Sttaes en route to Italy, where they arrived on February 2, 1906. The purpose of their trip was to join Maddelena's parents who were visiting relatives in Italy. At the time she departed from the United States, Maddelena Montana was about four months pregnant.

Maddelena, the sole witness in the declaratory judgment action under review (plaintiff's illness precluded his testifying; the government offered no evidence) testified as to those subsequent events. About a month and a half after arriving in Italy, Maddelena, wishing to return to the United States, accompanied her parents to a "little town" to obtain passports. Her parents secured their passports, but the official on duty was unable to find her name. He informed Maddelena that she must see the American Consul to get her passport. Two or three days later Maddelena and her mother traveled to the American Consulate in Naples. According to her testimony, Maddelena said, "I want to go back to the United States and [the Consul] just took one look at me and he says, 'I am sorry, Mrs., you cannot go in that condition * * *. You come back after you get your baby.'" After this visit to the American Consulate Maddelena went to Acerra, Italy where she resided with her mother and where the plaintiff was born on June 26, 1906.

In late March or early April, 1906, Guiseppe Montana had returned to the United States. Maddelena stated that at this time they "were on the outs. We were not talking."

After the birth of plaintiff, Maddelena returned to the American Consul from whom she secured a passport. She

stated she had "not much" conversation with the Consul, but "asked him about my baby's passport, and he said, 'You don't need it. It is in your own passport.'"

Maddelena, with plaintiff and his grandmother, then returned to the United States. The records of the Immigration Service produced at the trial reveal that plaintiff (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother and alien grandmother.

After arrival in this country, plaintiff lived for three months with Maddelena and her parents. Thereafter, until his marriage in 1927, he lived with both parents who had become reconciled. After his marriage, and continuing to date, plaintiff has resided with his own family in the Chicago, Illinois area. At no time has he instituted naturalization proceedings.

On January 7, 1958, plaintiff was served by the Immigration and Nationality Service with an order to show cause why he should not be deported. After an administrative hearing, an order directing his deportation became final on August 29, 1958. On September 3, 1958, plaintiff commenced the instant declaratory judgment action to define his citizenship status, to declare the deportation proceedings null and void, and to restrain defendant from taking any action on the basis of such proceedings.

In action relevant to this appeal, the district court, after a trial on the merits, entered judgment in favor of defendant and dismissed the complaint, from which judgment this appeal is taken.

On the basis of the described facts, plaintiff offers six theories which he contends establish his citizenship. His central argument revolves around the applicable statutory law in existence at the time of his birth. Plaintiff asserts that he became a citizen at birth by the operation of Section 2172 of the Revised Statutes of the United States.[1]

[1] Section 2172, Rev. Stat. § 2172 (1875), provided in relevant part: "* * * and *the children of persons who now are, or have been, citizens of the United States,* shall, though born out of the limits and jurisdiction of the United States, be considered as citizens * * *." (Emphasis added.)

The Attorney General contends that Section 1993 of the Revised Statutes[2] exclusively and precisely controls the factual situation in question here and that citizenship under that section can be conferred to a child born abroad *only if the father was a citizen.*

Both Sections 2172 and 1993 were enacted as a part of the Act of June 20, 1874, 18 Stat. ch. 333, a comprehensive codification of all laws (including existing nationality statutes) which repealed prior laws. No other relevant statutes were enacted prior to plaintiff's birth in 1906. Section 2172, as enacted was substantially identical to Section 4 of the Act of 1802, 2 Stat. 155 (see 8 U.S.C.A. §§ 1-18, Historical Note). Section 1993 reenacted the Citizenship Act of 1855, 10 Stat. 604.

Congress had passed the Act of 1855 in response to an article by Mr. Horace Binney in 2 American Law Reports (1854) in which Mr. Binney declared that the Act of 1802 was retrospective in application; that the phrase "children of persons who now are, or have been, citizens of the United States" is operative *only* to persons born prior to the Act of 1802; and that there were no operative statutes covering similar situations subsequent to 1802. The Act of 1855 remedied that defect. See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 665, 673, 674 (1898); *Weedin* v. *Chin Bow*, 274 U.S. 657, 663, 664 (1927). That statute provided that persons "*heretofore or hereafter*" born abroad of *citizen fathers* (when such fathers had resided in the United States) were declared to be citizens of the United States. This Act expressly operated retrospectively and prospectively, but no repealer of the Act of 1802 was provided.

This provision was reenacted by the Act of 1874 and appeared as Section 1993 of the Revised Statutes. It expressly applied prospectively and retrospectively. However, plaintiff contends that Section 2172, reenacted concurrently, operated prospectively and is the basis for de-

[2] Section 1993, Rev. Stat. § 1993 (1875), provided:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, *whose fathers were* and may be at the time of their birth, *citizens* thereof, are declared to be citizens of the United States; but rights of citizenship shall not descend to children whose fathers never resided in the United States." (Emphasis added.)

claring his citizenship.[3] It is true that Section 2172 was not expressly limited to certain factual situations in point of time prior to 1802. The lack of such limiting language may have been due to inadvertence. It may have been enacted to apply to situations between 1802 and 1855. Cf. *Wong Kim Ark*, 169 U.S. at page 674. It may have been reenacted merely to save rights of citizenship which accrued prior to 1802.

In any event; considering both sections of the Act of 1874, we hold that Section 1993 applies exclusively to the factual situation before us. Since plaintiff's father was not a citizen of the United States, no rights of citizenship descended to plaintiff at birth. This determination is consistent with the holdings in *Mock Gum Ying* v. *Cahill*, 9 Cir., 81 F. 2d 940 (1936); and *Anthony D'Alessio* v. *John M. Lehman, District Director of Immigration and Naturalization Service*, N.D.D.C. Ohio, ... F. Supp. ..... (Feb. 26, 1960).

Plaintiff advances other theories of citizenship based on statutory grounds. They can be rejected summarily. Plaintiff argues that citizenship vested in him under Section 1993, *supra*, since at birth he was in the sole custody of his mother (his father having returned to the United States). However, the Department of State ruling he relies upon relates to illegitimate children who do not have a father in contemplation of law. In addition, plaintiff argues that Section 1 of the Act of 1934, 48 Stat. 797, (which grants citizenship to infants born abroad to either a citizen father *or* mother) is prospective and retrospective in operation and that it is merely declaratory of existing law. But an examination of this section reveals that it is expressly limited in its operation to children "hereafter born" abroad. Finally, plaintiff argues that he gained citizenship by the terms of Sections 3 and 5 of the Act of March 2, 1907, 34 Stat. 1228, 1229. This act denationalized American women who married aliens and

[3] Plaintiff construes the provision "the children of persons" to apply in the distributive and not to require both parents to be citizens; and "now are or have been * * * born" to operate both prospectively and retrospectively.

provided that minor children born abroad of such alien parents should be deemed citizens of the United States upon the resumption of American citizenship by the mother. However, in this case plaintiff's mother never lost her citizenship, and there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization. See *In re Wright*, E.D.D.C. Pa., 19 F. Supp. 224 (1937).

Plaintiff has advanced a novel constitutional argument that Fourteenth Amendment rights of citizenship attach at the moment of conception and that since plaintiff was conceived in the United States, he is a citizen. Whatever rights might accrue to an unborn child by the operation of the common law and by statute, it is clear that the Fourteenth Amendment limits citizenship to persons "*born* • • • in the United States."

Further, the action of the American Consul in Naples (even if one is fully to believe Maddelena) in refusing to issue a passport is not sufficient, as a matter of law, to grant citizenship to plaintiff. The cases cited by plaintiff relate to native-born citizens; the issues there were voluntary expatriation. These holdings do not control the situation before us. See *Dos Reis* v. *Nicolls*, 1 Cir., 161 F. 2d 860 (1947); and *Podea* v. *Acheson*, 2 Cir., 179 F. 2d 306 (1950).

Finally, even if the action of Immigration officials (the record of such action was introduced at trial) was sufficient to establish a *prima facie* case of plaintiff's citizenship, it was rebutted convincingly by the showing that the Immigration officers committed legal error in designating plaintiff as a citizen at the time of his entry. See *Lee Hon Lung* v. *Dulles*, 9 Cir., 261 F. 2d 719 (1958); and *Delmore* v. *Brownell*, 3 Cir., 236 F. 2d 598 (1956). Such designation of plaintiff's citizenship was neither the formal adjudication in *Lung* nor the considered determination in *Delmore*.

The judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago 10, Illinois

Thursday, May 26, 1960

Before

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

No. 12851

MAURO JOHN MONTANA,
Plaintiff-Appellant,
v.
WILLIAM ROGERS, Attorney General of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Tuesday, May 31, 1960
Hon. John S. Hastings, Chief Judge

No. 12851
MAURO JOHN MONTANA,
Plaintiff-Appellant,
v.
WILLIAM ROGERS, Attorney General of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On petition of counsel for plaintiff-appellant,

It Is Ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed to and including June 30, 1960, pursuant to provisions of Rule 28 of the Rules of this Court.

No. 198

In the Supreme Court of the United States

OCTOBER TERM, 1960

MAURO JOHN MONTANA, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 198

MAURO JOHN MONTANA, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 4a–9a) is reported at 278 F. 2d 68.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1960. A petition for rehearing was denied on May 26, 1960. The petition for a writ of certiorari was filed on June 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who was born in Italy in 1906 of a citizen mother and an alien father, was a citizen

of the United States at birth, or became a citizen on his mother's return to the United States.

STATUTES INVOLVED

R.S. 2172 (1878 ed.), which is substantially the Act of April 14, 1802, 2 Stat. 153, Section 4, provided in pertinent part:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; * * *.

R.S. 1993 (1878 ed.), which is substantially the Act of February 10, 1855, 10 Stat. 604, Section 1, provided:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

STATEMENT

Petitioner was ordered deported by the Immigration and Naturalization Service after a hearing. He

then brought this action in the United States District Court for the Northern District of Illinois seeking a judgment declaring him to be a national of the United States (R. 6–12). The pertinent facts are as follows:

Petitioner was born in Italy on June 26, 1906, of an alien father and a citizen mother (R. 7, 8). His parents, who had lived in the United States, had arrived in Italy in February 1906 (R. 22). His father returned to the United States in April 1906 and his mother returned with petitioner in September 1906 (R. 25, 27). Petitioner's mother testified at the trial that before petitioner was born she tried to get a United States passport to return to the United States, but the American Consul refused to issue the passport because she was pregnant (R. 22–23). She obtained the passport with no difficulty after petitioner was born (R. 25). She also testified that she and her husband did not live together for about three months after she returned to the United States in 1906 but that thereafter they became reconciled. They continued to live together up to the time of trial (R. 25–26, 28–29).

The district court found that under the applicable statute, R.S. 1993, *supra*, petitioner had not acquired United States citizenship at birth, since his father was an alien (R. 38–40). The court of appeals affirmed.

ARGUMENT

1. Petitioner claims (Pet. 8–13) that he became a citizen when born abroad of an American citizen mother and alien father under R.S. 2172, *supra*,

p. 2. It is clear, however, that petitioner's reliance on R.S. 2172 is misplaced.

R.S. 2172 was an almost verbatim reenactment of the second clause of Section 4 of the Act of April 14, 1802, 2 Stat. 155, which had provided:

> * * * the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided,* that the right of citizenship shall not descend to persons whose fathers have never resided within the United States * * *.

The Act of 1802 had been found to be defective in that it granted citizenship only to those foreign-born children whose parents were citizens on or before April 14, 1802.[1] Therefore, Congress in 1855 passed legislation (10 Stat. 604) to grant citizenship rights to children whose fathers were citizens at the time of their birth,[2] and this provision was made retroactive as well as prospective in operation. See 32 Cong. Globe 170–171; *Weedin* v. *Chin Bow,* 274 U.S. 657, 663–664; *United States* v. *Wong Kim Ark,* 169 U.S. 649, 674. But this statute, which later became R.S. 1993, *supra,* p. 2, clearly did not bestow citizenship on children born of an alien father even though the mother was a citizen. In fact, Congressman Cutting,

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[1] See 2 American Law Register 193. Considering congressional recognition of the views of Mr. Horace Binney there expressed, it is now too late to argue that Mr. Binney was wrong.

[2] The statute further required that the *father* reside in this country at some time prior to his child's birth. See *Weedin* v. *Chin Bow,* 274 U.S. 657.

who proposed the 1855 legislation, specifically pointed out this limiting feature during debate (32 Cong. Globe 170, 33rd Cong., 1st Sess.):[3]

> "In the reign of Victoria, in the year 1844, the English parliament provided that the children of English mothers, though married to foreigners, should have the rights and privileges of English subjects, though born out of allegiance. *I have not, in this bill, gone to that extent, as the House will have observed from the reading of it.* [Emphasis added.]

The limitation to fathers has been recognized by this Court (*Weedin* v. *Chin Bow*, 274 U.S. 657), by commentators (3 Hackworth, *Digest of International Law*, § 222, pp. 17–23 (1942)), and by Congress when it made a change in the statute in 1934 (48 Stat. 797) to provide for United States citizenship for children thereafter born outside the United States whose father *or mother* was an American citizen. See H. Rep. No. 131, 73rd Cong., 1st Sess.; S. Rep. No. 865, 73rd Cong., 2d Sess.

The reason for the inclusion of the second clause of Section 4 of the Act of 1802 in the Revised Statutes (R.S. 2172) is somewhat puzzling.[4] But, as applied to

[3] The bill was adopted, substantially as introduced, in the second session of the 33rd Congress. See 36 Cong. Globe 91–92, 116, 632, 644, 651.

[4] Perhaps, the explanation is that Congress intended to carry over only the first clause of Section 4 of the 1802 Act, which dealt with the citizenship of minor children deriving from their parents' naturalization—a subject not touched by the Act of 1855—and by inadvertence carried over the second clause as well. This explanation seems most plausible in light of the fact that R.S. 2172 came under the heading "Naturalization" in the Revised

petitioner, who was born in 1906, there is no conflict between R.S. 1993 and 2172. Whether "now" if used alone in R.S. 2172 would have been capable of prospective application (see Pet. 10), the whole phrase used in R.S. 2172, "persons who now are, or have been, citizens" has no prospective implication. Particularly is this so when that language is contrasted with the language of R.S. 1993 referring to children "heretofore born or hereafter born" whose fathers "were or may be at the time of their birth" citizens. Congress knew how to make a statute prospective when it intended to do so. And if there were a conflict between R.S. 2172, derived from the Act of 1802, and R.S. 1993, derived from the Act of 1855, the Act of 1855 would control. See *Stephan* v. *United States*, 319 U.S. 423, 426; *Posadas* v. *National City Bank*, 296 U.S. 497, 503–505; *Red Rock* v. *Henry*, 106 U.S. 596, 602. Furthermore, even if R.S. 2172 could be considered as governing, its language would seem to require that *both* parents be citizens of the United States.[5]

In sum, the history shows that in 1855 Congress thought that it was granting greater rights than had

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Statutes, while R.S. 1993 came under the heading "Citizenship." Or, as the court of appeals suggested (Pet. 8a), the second clause may have been enacted either to apply to persons born between 1802 and 1855 or to save rights of citizenship arising before 1802.

[5] In 2 Kent, *Commentaries*, pp. 51–53 (5th ed., 1844), it is suggested that the clause in the original 1802 statute requiring that the *father* should have resided in the United States indicated that the statute should be properly construed to permit derivative citizenship through the father regardless of the nationality of the mother. No suggestion was made that the nationality of the mother alone would govern.

theretofore existed by permitting citizenship to be acquired from the father alone. 32 Cong. Globe 170. Thus, the courts which have had the question before them have, in accord with the opinion below, ruled that the citizenship of a child born abroad between 1855 and 1934 is determined by R.S. 1993, not R.S. 2172. *Ying* v. *Cahill*, 81 F. 2d 940 (C.A. 9); *D'Alessio* v. *Lehman*, 183 F. Supp. 345 (N.D. Ohio).

2. Alternatively, petitioner argues (Pet. 14–18) that, when his mother returned to the United States in September 1906, she "resumed" American citizenship and that he became a citizen through her by virtue of such "resumption." In 1907 Congress provided that a United States citizen who married a foreigner shall take the nationality of her husband but that at the termination of the marital relationship she could "resume" her American citizenship. Act of March 2, 1907, 34 Stat. 1228. At that time, Congress also provided that a minor child born outside the United States of alien parents who was or came to the United States during minority should be deemed a United States citizen "by virtue of the naturalization of or resumption of American citizenship by the parent." That citizenship of a child could come through the mother was made explicit by the Act of May 24, 1934, 48 Stat. 797.[6] Both acts, however, were generally interpreted as permitting citizenship through a mother only when she had legal

[6] In 1922, Congress provided that a female United States citizen who married an alien did not lose her citizenship by the marriage, and made provision for expeditious reacquisition of citizenship by women who had previously lost their United States nationality. Act of September 22, 1922, 42 Stat. 1021.

or practical custody of a minor child, a requirement which was made express in the 1940 and 1952 Acts. See *Kletter* v. *Dulles*, 111 F. Supp. 593, 597–598 (D. D.C.), affirmed, 268 F. 2d 582 (C.A. D.C.), certiorari denied, 361 U.S. 936.

Neither the 1907 Act nor the 1934 Act has any relevance to this case. First, petitioner's mother never lost her United States citizenship[7] (her marriage to an alien having taken place before 1907) so that she never had occasion either to be naturalized or to resume United States nationality. Second, even if petitioner's mother somehow lost her nationality in 1906, her return occurred in 1906 before the 1907 Act allowing resumption of citizenship was passed.[8]

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[7] Although prior to the adoption of the Act of 1907, there was a conflict in court decisions as to whether an American woman lost her citizenship solely by marriage to a foreigner (compare *In re Page*, 12 F. 2d 135, 136 (S.D. Cal.), with *Petition of Zogbaum*, 32 F. 2d 911, 912 (D. S.D.)), the better reasoned cases held that loss of citizenship did not occur solely because of marriage to a foreigner, but would result only by marriage to a foreigner accompanied by a change of domicile. The theory was that, by such a marriage coupled with change in domicile, the American woman acted to "adopt the nationality of her husband." *In re Lynch*, 31 F. 2d 762 (S.D. Cal.); see, *e.g.*, *In Re Wright*, 19 F. Supp. 224 (E.D. Pa.); *In re Fitzroy*, 4 F. 2d 541 (D. Mass.); *Ruckgaber* v. *Moore*, 104 Fed. 947 (E.D. N.Y.), affirmed, 114 Fed. 1020 (C.A. 2). The trip of petitioner's mother to Europe for only seven months did not constitute a change of domicile.

[8] Thus, if the mother had lost her citizenship, both parents were aliens when petitioner was born abroad. Petitioner would then have to rely on the first clause of R.S. 2172 which speaks of "children of persons who have been duly naturalized under any law of the United States." Not only was petitioner's mother not naturalized under any law, but, as discussed above, "persons" seems to require naturalization of both parents.

Moreover, the 1907 Act allows resumption of citizenship only upon "the termination of the marriage relation"—which has never occurred here. Third, when the 1934 Act was passed, allowing a minor child to acquire citizenship through naturalization or resumption of citizenship of the mother, petitioner was twenty-nine years old. And, finally, the mother's testimony that she had quarreled with her husband and lived apart from him for three months does not show that the mother had legal custody of petitioner. Indeed, the record of arrival showed that petitioner was destined to his father (R. 37).

The short of the matter is that, at petitioner's birth, Congress had not provided for United States nationality for children born abroad of a United States citizen mother and an alien father. Petitioner was born abroad of an alien father and was an alien when he entered this country. Since his father never became naturalized during petitioner's minority, petitioner remained an alien.

3. Petitioner claims (Pet. 19–20) that his mother was prohibited from bearing him in the United States by the refusal of an American consul to issue her a passport before his birth. But in 1906 an American passport was not a necessary document for United States citizens wishing to come to the United States. The requirement of a passport as an entry document was not imposed until the Act of May 22, 1918, 40 Stat. 559.

The mother's story, moreover, has the ring of incredibility. It seems unlikely that she would have left the United States without a passport and then

sought to obtain one in Italy. If she had a passport when she left, it would have been unnecessary for her to obtain a passport abroad since such a passport was then valid, without renewal, for one year. R.S. 4075.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM RICHARD WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JULY 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 198

MAURO JOHN MONTANA,
Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER, MAURO JOHN MONTANA

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IN THE

SUPREME COURT OF THE UNITED STATES

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BRIEF FOR PETITIONER, MAURO JOHN MONTANA.

OPINION OF THE COURT BELOW.

The opinion in the Court of Appeals (R. 50-56) is reported at 278 F. 2d 68.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on April 29, 1960. (R. 56). On May 26, 1960, it was ordered by the said Court of Appeals that the petition for rehearing be denied (R. 57). The petition for a writ of certiorari was filed on June 29, 1960, within ninety days of the denial of the said petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED.

The pertinent text of the following statutory provisions is set forth in the appendix hereto, *infra*, pp. 1a-4a.

Act of April 14, 1802, 2 Stat. 155, Section 4.
Section 2172 of the Revised Statutes of 1874.
Section 1993 of the Revised Statutes of 1874.
Act of March 2, 1907, 34 Stat. 1228, 1229, Sections 3 and 5.
Act of May 24, 1934, 48 Stat. 797, Sections 1 and 2.

QUESTIONS PRESENTED FOR REVIEW.

1. Is the petitioner, who was born in Italy in 1906 to a United States citizen mother and a United States resident alien father, a citizen of the United States by operation of Section 2172 of the Revised Statutes of 1874?

a. In that Statute, does the term "persons who now are, or have been, citizens of the United States" apply distributively to either parent?

b. Is Section 2172 of the Revised Statutes of 1874 an exception to the presumption that a statute is meant to have prospective application?

2. May Section 1993 of the Revised Statutes of 1874, reenacted simultaneously with Section 2172 and pertaining to the same general subject, be enforced to the total exclusion and nullification of the Section 2172?

a. Do not the principles of statutory construction require that the statutes be reconciled, and mutually enforced, if they are not inherently inconsistent?

3. Did the petitioner become a citizen upon the resumption of residence in the United States by his citizen mother under the declaratory provisions of the Act of March 2,

1907; or, as a result of such resumption of residence and his own continued residence in the United States by operation of Section 2 of the Act of May 24, 1934?

a. Can the law of citizenship be so interpreted that a naturalized mother or expatriated mother, who resumed citizenship, pass greater rights to their respective foreign born child, than does a citizen mother who never lost her citizenship?

4. Should not a court of the United States exercise its equitable powers to rectify the frustration by a consular official of the desire and attempt of petitioner's mother to return to the United States before the birth of petitioner, and translate that desire and attempt into fact?

STATEMENT OF THE CASE.

The following statement incorporates the facts, almost verbatim, as narrated by the United States Court of Appeals for the Seventh Circuit in its opinion of April 29, 1960:

This declaratory judgment action was brought under the provisions of Section 360 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1503). The petitioner initiated the suit to determine his citizenship, a controversy having been precipitated by an administrative order directing his deportation. William P. Rogers, Attorney General of the United States, is the respondent as the head of the administrative agency issuing the order. (R. 41-44)

Petitioner was born in Italy on June 26, 1906. His mother, Maddelena Montana, was born in Jersey City, New Jersey, in 1890. Her father was a naturalized American citizen. She lived in Jersey City until her marriage on

August 26, 1905, to Guiseppe (Joe) Montana, father of petitioner. (R. 20) Guiseppe Montana was born in Italy. Prior to his marriage, he had resided in either Brooklyn, New York or Bayonne, New Jersey without acquiring citizenship status in the United States. (R. 21)

On the 15th or 16th day of January, 1906, Maddelena and Guiseppe Montana left the United States en route to Italy, where they arrived on February 2, 1906. (R. 21-22) The purpose of their trip was to join Maddelena's parents who were visiting relatives in Italy. (R. 23) At the time she departed from the United States, Maddelena Montana was about four months pregnant.

About a month and a half after arriving in Italy, Maddelena, wishing to return to the United States, accompanied her parents to a "little town" to obtain passports. Her parents secured their passports, but the official on duty was unable to find her name. He informed Maddelena that she must see the American Consul to get her passport. Two or three days later Maddelena and her mother traveled to the American Consulate in Naples. (R. 22) According to her testimony, Maddelena said, "I want to go back to the United States and [the Consul] just took one look at me and he says, 'I am sorry, Mrs., you cannot go in that condition * * *. You come back after you get your baby.'" (R. 23) After this visit to the American Consulate, Maddelena went to Acerra, Italy where she resided with her mother and where the petitioner was born on June 26, 1906. (R. 24)

In late March or early April, 1906, Guiseppe Montana had returned to the United States. Maddelena stated that at this time they "were on the outs. We were not talking." (R. 25)

After the birth of petitioner, Maddelena returned to the American Consul from whom she secured a passport. She stated she had "not much" conversation with the Consul, but "asked him about my baby's passport, and he said, 'You don't need it. It is in your own passport.'" (R. 25)

Maddelena, with petitioner and his grandmother, then returned to the United States. The records of the Immigration Service procured at the trial reveal that petitioner (then three months old) was admitted to this country as a citizen, accompanied by his citizen mother and alien grandmother. (Pl. Ex. 1; R. 28, 37)

After arrival in this country, petitioner lived for three months with Maddelena and her parents. Thereafter, until his marriage in 1927, he lived with both parents who had become reconciled. (R. 26) After his marriage, and continuing to date, petitioner has resided with his own family in the Chicago, Illinois, area. (R. 29-30)

On January 7, 1958, petitioner was served by the Immigration and Nationality Service with an order to show cause why he should not be deported. After an administrative hearing, an order directing his deportation became final on August 29, 1958. (R. 8, 17) On September 3, 1958, petitioner commenced the instant declaratory judgment action to define his citizenship status, to declare the deportation proceedings null and void, and to restrain respondent from taking any action on the basis of such proceedings. (R. 41)

The district court, after a trial on the merits, entered judgment in favor of respondent and dismissed the complaint. (R. 38-40) Appeal was taken to the United States Court of Appeals for the Seventh Circuit. (R. 40)

On April 29, 1960, the said Court of Appeals affirmed the judgment of the District Court, holding that Section 1993 of the Act of 1874 applies exclusively to the instant facts; that since petitioner's father was not a citizen of the United States, no rights of citizenship descended to petitioner at birth; that since petitioner's mother never lost her citizenship, there could be no later resumption of citizenship by which petitioner could claim a derivative naturalization; that no rights of citizenship could accrue to a child under the Fourteenth Amendment by the fact of conception in the United States. (R. 50-56)

Petition for rehearing was denied on May 26, 1960 (R. 57). This Court granted certiorari on October 17, 1960. (R. 57)

ARGUMENT.

I.

PETITIONER, WHO WAS BORN IN ITALY IN 1906, THE SON OF A NATIVE BORN UNITED STATES CITIZEN MOTHER AND A UNITED STATES RESIDENT ALIEN FATHER, IS A CITIZEN OF THE UNITED STATES BY OPERATION OF SECTION 2172 OF THE REVISED STATUTES OF THE UNITED STATES.

Petitioner contends he was a citizen of the United States, when he was born in 1906 of a United States citizen and resident mother and an United States resident alien father. His contention is based on the requirement that effect must be given to the plain words of the second clause of Section 2172 of the Act of 1874:

> "... the children of persons who now are, or have been, citizens of the United States, shall though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; ..." (Appendix p. 2a).

Section 2172 of the Act of 1874 is a substantial reenactment of the Act of April 14, 1802, excepting that the following proviso was omitted at the time of reenactment.

> "Provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States: ..." (Appendix p. 1a).

A literal reading of the section clearly gives petitioner citizenship by derivation from the citizenship of his mother, if (1) the Act was effective at the time of his birth in Italy in 1906 and if (2) the term "persons who now are, or

have been, citizens of the United States" applies distributively to either parent, and does not require that both parents be citizens.

It is our submission that the wording of Section 2172 of the Act of 1874 which provides "the children of persons" means "the child of any person" and is the plural used in the generic sense. The plural to encompass the distributive is common and usual in statutory drafting, and is ordinarily so understood.

But we need not rely exclusively on common and ordinary understanding. Section 1 of the Revised Statutes of 1874 expressly provides that "In determining the meaning of the revised statutes . . . words importing the plural number may include the singular."

On several occasions the meaning of the first clause of Section 2172 has come before the courts for determination and it has been uniformly held that the child of a naturalized mother and alien father falls within the description "the children of persons". The same rule must apply to the identical expression "the children of persons" used later in the same sentence with reference, not to the children of naturalized citizens, but to the children born abroad of American citizens. The child born abroad of an American mother and an alien father is clearly comprehended within the second clause of Section 2172. It is inconceivable that Congress could have used an identical expression [i.e., "the children of persons"] twice in the same sentence and intended thereby to attach to that expression two different meanings. It is clear that this expression "the children of persons" as used in the second clause of Section 2172 of the Revised Statutes means any child of any person who is an American citizen, without reference to whether that person be an American mother or an

American father and without reference to the alienage of the other parent. The following cases are all square holdings to the effect that the word "persons" as used in the first clause of Section 2172 of the Revised Statutes means either father or mother, and that a mother is enabled to pass citizenship to her children through her naturalization in the United States even though the father is an alien: *United States* v. *Kellar*, 13 F. 82 (D. Ill. 1882, opinion by Justice Harlan later of the Supreme Court of the United States); *United States* v. *Rodgers*, 144 F. 711 (E. D. Pa., 1906); *In re Graf*, 277 F. 969 (D. Md. 1922); *In re Bishop*, 26 F. (2d) 148 (W. D. Wash., N.D. 1927); *Matter of Owen*, 36 Ops. Atty. Gen'l (U.S.) 197 (1929).

In the United States it was early recognized that in some circumstances citizenship descended through the mother as well as through the father. Thus, in *United States* v. *Sanders*, 27 Fed. Cas. No. 16,220 (D. Ark.), an indictment for murder was dismissed because it appeared that the prisoner was an Indian and henee not within the jurisdiction of the court. The facts of that case were that he was the child of an Indian mother and a white father and the court adjudged he was therefore an Indian:

> "That act does not define an Indian, but uses a general term without embracing or excluding any particular class of persons. On consultation with my brother judge we concur in laying down this rule as the safest: that the child must follow the condition of the mother. If the mother is an Indian woman her offspring must be considered Indians within the meaning of the proviso alluded to, whether the father be a white man or Indian. And so, on the other hand, the child of a white woman by an Indian father, would, for all the purposes of that act, be deemed of the white race; the condition of the mother, and not the quantum of Indian blood in the veins, determining

the condition of the offspring. This is substantially following the common law rule, which was borrowed from the civil law. Just. Inst. bk. 1, tit. 4, p. 13. The rule of the civil law was, that one born of a free mother was free, although the father was a slave; and so on the other hand, if the mother was a slave the offspring partook of her condition. Ruth. Inst. 247; *Shelton* v. *Barbour*, 2 Wash. (Va.) 67. There can be no doubt that the rule *partus sequitur ventrem* generally obtains in this country."

See also: *Roa* v. *Collector of Customs*, 23 Phil. Rep. 315, (1912):

"The words of Section 2172 are perfectly clear and unambiguous and it follows that their meaning must govern the courts whose "duty is simply to enforce the law as it is written" (*Chung Fook* v. *White*, 264 U.S. 443, 446). In any view of the matter, Mrs. Montana is a "person" comprehended within Section 2172 and plaintiff has gained citizenship through her American citizenship. Petitioner here satisfies the statutory qualifications for citizenship as set forth in Section 2172.

The principal resistance met in petitioner's effort to be declared a citizen under Section 2172 has not been directed to his failing to meet the statutory qualification. It has been an urging that Section 2172 be given retrospective operation.

The contention for retrospective application of the statute is made in the face of the very strong legal presumption that a statute is not meant to act retrospectively, and that it ought never to receive such a construction unless it is susceptible of no other. The presumption is that a statute will never be so construed unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legisla-

ture cannot be otherwise satisfied. *United States Fidelity and Guaranty Company* v. *United States for Use and Benefit of Struthers Wells Co.* 209 U.S. 306, 314.

Certainly there is nothing in the legislative history that compels rebuttal of the presumption. The Act of 1802 was the repealer of the hated Alien and Sedition laws, the so-called Nationality Act of 1798, it was the Jeffersonian measure designed to replace the Alien and Sedition laws with a *liberal* nationality and naturalization law. Logic requires that we do not attribute to the Jeffersonians a replacement that spoke only as of April 14, 1802, with no provision for the future. We submit that the real or implied intention of Congress does not require retrospective operation. Even Mr. Binney, the earliest advocate of retrospective operation, admitted he was not able to imagine any plausible political reason for it. (*Weedin* v. *Chin Bow*, 274 U.S. 657, 663.)

The other alternative for support of retrospective operation that "now" is a word so strong, clear and imperative that it always and invariably means at the present time, that is, at the time of the enactment of the Act of 1802. It is our submission that the statute does not meet the test. There is ample authority for statutory construction of the word "now" relating to a time contemporaneous with satisfaction of the provisions of the Act in which the word occurs. See *Protest of Chicago, R.I. & P. Ry. Co.*, 137 Okla. 186; *State* v. *City of St. Lawrence*, 101 Kan. 225; *Thompson* v. *Board of Commissioners of Reno County*, 127 Kans. 863; *Worthen* v. *Burgess*, 273 Mass. 437; *Board* v. *Smith*, 22 Ky. 430; *City of St. Louis* v. *Dorr*, 144 Mo. 466; *Clark* v. *Lord*, 20 Kans. 390; *Tillamook City* v. *Tillamook County Court*, 56 Ore. 112. It is our submission, in accordance with such approved interpretation of the word, that "now" means

as of the time when any citizenship case arises—that is, the statute speaks as of the time when any person who is a United States citizen has a child born abroad.

The Court of Appeals for the Seventh Circuit, by its decision, gives strength to the construction for which we contend, wherein it provides "It is true that Section 2172 was not expressly limited to certain factual situations in period of time prior to 1802." (R. 54) Since it is not expressly limited, then the words of the statute are not so strong, clear and imperative as to overcome the strong presumption of prospective operation.

Logic and the principles of statutory construction appear to direct our adherence to the basic rule of prospective operation in the application of Section 2172.

However, in reliance on *Mock Gum Ying* v. *Cahill*, 9 Cir., 81 F. 2d 940, and *D'Alessio* v. *Lehman*, N.D. Ohio, 183 F. Supp. 345, the Court of Appeals for the Seventh Circuit has apparently adopted the theory of retrospective application of Section 2172 in the case at bar.

In the *D'Alessio* case, the foreign born child relied upon the application of the Act of 1802. The Court, however, finding plaintiff directly within the provisions of Section 1993 as the son of a citizen father, rejected the argument because the father had not resided in the United States prior to plaintiff's birth. It will be observed that this petitioner fully satisfies the paternal residence proviso in the Acts of 1802 and 1855, as reenacted in 1874, conditional to the grant of citizenship. The qualification is that "the right of citizenship shall not descend to persons whose fathers have never resided within the United States." Guiseppe Montana, the father of the petitioner, had resided in the United States both prior and subsequent to petitioner's birth. (R. 21, 26, 29)

The *Mock Gum Ying* case, however, does clearly apply Section 2172 retrospectively on a set of facts similar to those at bar. The Ninth Circuit, in that case, as well as the Seventh Circuit in this case, bottomed their findings of retrospective application on apparent endorsements of such application in this Court's decision in *United States* v. *Wong Kim Ark,* 169 U.S. 649 and *Weedin* v. *Chin Bow,* 274 U.S. 657.

Wong Kim Ark, supra, presented a single question of whether a child born in the United States of alien, resident parents, became at the time of his birth a citizen of the United States. The decision was that, by virtue of the Fourteenth Amendment, he did. Thus was presented an issue and decision wholly distinct from the cause at bar. In *Weedin* v. *Chin Bow, supra,* the issue was presented as to whether citizenship descended to the grandchild of a native born citizen, when the father of the child had never been in the United States prior to the child's birth (the same question was the basis of decision in the *D'Alessio* case *supra.*). The decision was that such a child was not entitled to citizenship. Thus was there again presented an issue and decision wholly distinct from the case at bar. *Chin Bow,* in urging certain language in the *Wong Kim Ark* case in support of his position, was met with the retort that "It is very clear that the exact meaning upon the point here at issue was not before the court." (P. 671) We adopt the retort in respect of *Wong Kim Ark* and *Chin Bow* as they were advanced in the instant case.

The seed of the theory of retrospective application that saw fruition in *Mock Gum Ying* was founded in an article of Mr. Horace Binney in *The Alienignae of the United States.* 2 American Law Register 193 (1854), in consideration of the fore-running act of 1802. Mr. Binney's theory,

written more than 50 years after the enactment, rested upon a textual examination of the language of the act, is stated casually in an introductory paragraph and derives its sole plausibility from the use of the word "now" in the statute, *i.e.*," . . . the children of persons who *now* are . . . citizens of the United States . . ."

No reason of policy or authority has ever been suggested by Binney or anyone else which would have led the Congress of 1802 to make this Act apply only to those persons who were citizens prior to 1802. Inasmuch as Section 5 of the Act of 1802 repealed all prior naturalization and citizenship laws, it clearly must have been the intent of Congress to make this Act prospective and continuous, as well as retrospective in operation, because no reason suggests itself why the United States should be left without provisions as to naturalization or citizenship for any appreciable length of time. In fact, the next law dealing with citizenship and naturalization was not passed until 1855. It seems inconceivable as a matter of common sense and sound policy that Congress intended to leave the United States without any statutory regulation on this question of citizenship and naturalization for more than half a century. Furthermore, no reason has ever been suggested why such a deviation from the normal and usual policy of Congress in enacting citizenship and naturalization laws which are prospective and continuous as well as retrospective in operation should exist in this solitary instance.

This leads us into an inquiry as to the meaning of the language of the Act of 1802. Mr. Binney is the only person who has ever really considered this language adversely. He stated no convincing reason why the language of the fourth section of the Act of 1802 quoted above had to be construed as only applicable to persons born prior to 1802.

There seems to be no reason for any such holding unless the word "now" constitutes a clear, strong and imperative showing that it was the intent of Congress to limit the operation of the Act of 1802 to the cases of those persons who were or had been citizens prior to 1802 and that no provision was made for the children born abroad of American parents who became citizens after 1802. To support this contention it would be necessary to demonstrate that the word "now" always and invariably means at the present time—that is, at the time of the enactment of the Act of 1802. This is the only argument ever advanced by Mr. Binney or anyone else to justify killing the Act of 1802 by judicial fiat. But this is not the only meaning of the word, as we have demonstrated hereinabove.

Difficulty is evidenced by the decision of the Court of Appeals for the Seventh Circuit in trying to reconcile Mr. Binney's interpretation of retrospective application of the Act of 1802 with reenactment of substantially the same statute in 1874. Explanation is given in three alternatives.

Recognizing a lack of any express limitation on the operation of Section 2172 in the Act of 1874, the Seventh Circuit opined that "The lack of such limiting language may have been due to inadvertence." (R. 54) It is interesting that the government, too, urges inadvertence in enactment as the only justification for urging we do not enforce the statutory provisions of Section 2172 (See P. 45, their Answer to Petition). But this is contrary to the presumption that in construing a statute everything has been expressed which was intended. (*Ester* v. *Centennial Board of Finance*, 94 U.S. 500), and is in effect an amendment to this statute.

The second alternative advanced is that "It may have been enacted to apply to situations between 1802 and 1855." (R. 54) Thus, the Seventh Circuit impresses upon the Act of 1802, as reenacted, prospective application contrary to the rationale upon which this cause was found against your petitioner, in that it does give the Act of 1802 prospective application. It also leaves open the question of why Congress reenacted the statute in 1874, when, under this interpretation, its vitality had been sapped entirely twenty years earlier.

The third alternative is that "It may have been reenacted merely to save rights of citizenship which accrued prior to 1802." (R. 54) This concurs with the opinion in *Mock Gum Ying* v. *Cahill*, 9th Cir., 81 F. 2d 940, that "now" means April 14, 1802 (P. 943). But this alternative, as well as the second alternative is directly contradictory of the announced intention and object of the Act of 1874 to revise, simplify, arrange and consolidate all statutes of the United States *in force* as of June 22, 1874.

One other reason suggests itself for the abandonment of *Mock Gum Ying* v. *Cahill, supra,* in that case itself. The Ninth Circuit decision indicates that courts will not disturb administrative construction if it is uniform and has more or less continuous use, except for strong reasons (81 F. 2d at 942). Evidences of administrative construction of § 2172 are found in this case where, upon entry into the United States, petitioner was recognized as a citizen of the United States. In *Mock Gum Ying,* a brother and sister of the plaintiff born under the same circumstances were admitted into the United States as citizens. No "strong reasons" present themselves to abandon administrative construction demonstrated by these two reported cases. Strong reasons do exist for adopting that administrative construction.

That prospective application is the correct interpretation of the Act of 1802 is made clear by the proceedings of the Commissioners of Revision in enacting the Revised Statutes on June 22, 1874. We point out that the duty of the three Commissioners was "to revise, simplify, arrange and consolidate *all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings.*" Therefore, the inclusion of the Act of 1802 in the Revised Statutes with the changes and simplifications, *which were actually made in its structure,* as Section 2172, indicates that the Commissioners of Revision apparently had no doubt that the Act of 1802 was prospective and continuous in its operation. We submit that the intent of Congress was clear, both in 1802 and in 1874.

Further, all other portions of the Act of 1802 and Section 2172 of the Revised Statutes are prospective and continuous.

> "It was suggested that the act of 1802, from which as we have seen, section 2172 is taken, was intended to be temporary in its operation, and to apply only to cases arising previous to its passage. In support of that proposition reference was made by counsel to *Campbell* v. *Gordon,* 6 Cranch, 176. But the court does not perceive that that case maintains, or that the language of the act of 1802, in any degree justifies, any such interpretation of the statute." *United States* v. *Kellar,* 13 Fed. 82.

> "In our judgment the intention was that the act of 1802 should have a prospective operation" (citing authorities). *Boyd* v. *Nebraska,* 143 U.S. 135, 177.

> "The relevant section, 2172, which it is maintained confers the right of citizenship, is the culmination of a number of acts on the subject based by Congress from the earliest period of the Government. Their

history will be found in Vol. 3, Moore's International Law Digest, P. 467. * * *.

"The act has also been held to be prospective in its operation * * * *Boyd* v. *Nebraska*, 143 U.S. 135 * * *." *Zartarian* v. *Billings*, 204 U.S. 170, 173, 174.

We feel that a reading of the above decisions will convince the Court that these judges considered the whole of Section 2172 of the Revised Statutes and the whole of the Act of 1802 to be prospective and continuous in operation. To the same effect see also *State* v. *Andriano*, 92 Mo. 70, 4 S.W. 263 (1887), writ of error dismissed, 138 U.S. 496; *State* v. *Penney*, 10 Ark. 621 (1850); *O'Connor* v. *The State*, 9 Fla. 215 (1860).

We submit that the Act of 1802 from which Section 2172 was derived was intended to be and was prospective and continuous in its operation; that likewise Section 2172 of the Revised Statutes was speaking as of the time of plaintiff's birth to a citizen parent and he was therefore born a citizen of the United States.

II.

THE ACT OF 1855, REENACTED IN THE REVISED STATUTES OF 1874 AS SECTION 1993, WILL NOT BE INTERPRETED TO NULLIFY SECTION 2172, SIMULTANEOUSLY REENACTED.

Simultaneous with the reenactment of the aforedescribed statute in 1874, the Act of 1855 was also reaffirmed as Section 1993 of the Act of 1874:

> "All children heretofore or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (Appendix, p. 2a)

It is the holding of the United States Court of Appeals for the Seventh Circuit "In any event, considering both sections of the Act of 1874, Section 1993 applies exclusively to the factual situation before us. Since plaintiff's father was not a citizen of the United States, no rights of citizenship descended to plaintiff at birth." (R. 54) Thus the court chose to enforce one of two statutes enacted simultaneously and pertaining to the same subject to the total exclusion of the other, though there is no express nor implied suggestion by the legislature to overcome the rule of statutory construction that in such circumstances, the statutes must be treated as mutually operative. *Pen-Ken Gas and Oil Corporation* v. *Warfield Gas Company*, 6 Cir., 137 F. 2d 871, 881. As opposed to the finding of the Seventh Circuit, petitioner suggests the evaluation by Mr. Justice Harlan in *United States* v. *Kellar*, 13 F. 82, as more legally acceptable:

> "Since the several sections which have been quoted are in the same revision of the statutes, it is the duty of the court to give them, if possible, such construction as will make them all operative. Consistent with any fair or reasonable interpretation of the language employed by Congress, the court should reject any construction which would make one section inconsistent with another relating to the same general subject." *United States* v. *Kellar*, D. Ill., 13 F. 82, 83.

Sections 2172 and 1993 are not inherently inconsistent. Section 1993 is narrower in scope, declaring the citizenship of the foreign born child of the citizen parent; Section 2172, broader in scope, provides for the derivation of citizenship of the ~~foreign born~~ child of parents, either or both of whom is a United States citizen. Section 1993 may be regarded as applicable in the derivation of citizenship through the citizen parent, to the extent that it

requires the residence of the alien father in the United States at some time prior to the descent of citizenship to the child. See *United States ex rel. Guest* v. *Perkins*, D.C.D.C., 17 F. Supp. 177. It has been observed hereinbefore that this petitioner satisfies the prior residence requirement by the father.

There are other considerations and rules of statutory construction which militate against the decision entered by the Seventh Circuit in this cause. First, the courts are obliged to consider equity and good conscience in construing doubtful statues. *Dinkins et al.* v. *Cornish*, E.D. Ark., 41 F. 2d 766, 767. Certainly equity and good conscience rebel at this form of expatriation of a man who has spent the 54 years of his life, save the first few months, in this country, whose physiognomy, demeanor, comportment and language identify him as an American; whose United States citizen wife and four United States citizen children, as well as he, know no other country. Further, a statutory construction must not be adopted, the effect of which is to produce inequality and injustice. *Greer* v. *Kinnan*, 8 Cir., 64 F. 2d 605, 607. The interpretation of the Seventh Circuit gives to men as a class greater political rights than to women as a class.

We submit that law and reason support the position for which we contend. The urging of the Act of 1855 as controlling renders the reenactment nineteen years later of Section 2172 meaningless and the ordinary rules of statutory construction prohibit such consideration. The act of revision itself designates the enactment of 1874 and the concomitant repeal of all prior legislation. Act of June 22, 1874, Revised Statutes, 2nd Ed. 1878, Section 5595.

The government contends, nonetheless, for nullification of Section 2172, and exclusive application of Section 1993. To justify the nullification, the government makes the claim that Section 2172 was inadvertently reenacted. In contemplation of a different section on different subject matter—but the same revision—this Court has clearly rejected the argument of inadvertence:

> "The Revised Statutes of 1874 were adopted, it must be presumed, with the knowledge on the part of Congress of the constructions previously placed by the Patent Office upon the twenty-fifth section of the Act of 1870. This presumption is strengthened by an examination of the Act approved February 18th, 1875, entitled 'An Act to Correct Errors and to Supply Omissions in the Revised Statutes of the United States.' 18 Stat. at L. 316, Chap. 80. That Act, upon its face, shows that the entire revision of 1874, after it took effect, was carefully examined for the purpose of ascertaining whether there were errors or omissions in the work of revision. . . The Act of 1875, for the purpose of correcting errors and omissions, amended or repealed nearly seventy sections of the Revised Statutes. Still further—as an examination of the statutes will show—since the Revised Statutes went into operation nearly eight hundred sections, other than those referred to in the Act of 1875, have been amended or repealed. . ." *Bate Refrigerating Co.* v. *Sulzberger*, 157 U.S. 1, 45.

The argument of inadvertence finds its greatest refutation in the Revised Statutes themselves. The portions of Section 1993, which are derived from the Act of 1802, have been specifically eliminated from Section 2172:

> ". . . *provided*, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States." (Appendix p. 1a)

The careful excising of portions of the Statute reenacted elsewhere disproves inadvertence in the inclusion of Section 2172 in the revision.

Further disproof is found in the inclusion of Section 2172 and Section 1993 in the second edition of the Revised Statutes in 1878.

The precise purpose of Congress in reenacting the two sections relating to the same subject matter has never to our knowledge been clearly defined. Perhaps some explanation is available from their respective placements in the revision. Section 2172 is included under Title XXX of the Revised Statutes entitled "naturalization." Section 1993 is included under Title XXV entitled "citizenship." Conceivably, Congress intended that persons such as petitioner be regarded as comparable to those whose citizenship was derived from the naturalization of a parent, rather than as the declared citizens defined in Section 1993.

Whatever the reason, Congress did, in enacting Section 2172, provide that petitioner was a citizen through his mother. That provision may not be summarily overridden by guess and speculation, contrary to the express mandate of the provision, and contrary to the "duty . . . simply to enforce the law as it was written, when constitutionally possible." *Chung Fook* v. *White*, 264 U.S. 443, 446.

III.

PETITIONER BECAME A CITIZEN UPON THE RESUMPTION OF RESIDENCE IN THE UNITED STATES BY HIS MOTHER UNDER THE PROVISIONS OF THE ACT OF MARCH 2, 1907; OR, AS A RESULT OF SUCH RESUMPTION OF RESIDENCE AND HIS OWN CONTINUED RESIDENCE IN THE UNITED STATES BY OPERATION OF SECTION 2 OF THE ACT OF MAY 24, 1934.

In 1907, provision was made for the naturalization of foreign born children of naturalized parents, and of parents

who resumed citizenship. Such provision has been found declaratory of the common law. *Petition of Drysdale*, D.C. Mich., 20 F. 2d 957, 958. "Resumed" can only apply to expatriated mothers, "Naturalized" has been judicially determined to refer to either parent. No provision was made for naturalization of a foreign born child of a citizen mother. The necessary inference is that such a child required no provision, that he was a natural born citizen under Section 2172, *supra*. Otherwise a naturalized or an expatriated mother who resumed citizenship was, by law, endowed with greater political right and with power to pass greater rights than a native born mother who never lost her citizenship.

It is incongruous that citizen mothers who derived their citizenship by express mandate of the Constitution, without implementing statute, should be in a position less favorable than those governed by the fluctuating dispositions of Congress.

It is urged as an alternative that, during Mrs. Montana's visit to Italy, it be considered that her citizenship was in abeyance pending her return to the United States, and that, thus, upon her resumption of residence, petitioner became a citizen under the provisions of Section 2 of the Act of March 2, 1907:

> "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the . . . resumption of American citizenship by the *parent*: Provided, that such . . . resumption takes place during the minority of such child: And provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States." (Appendix, p. 4a)

As a second alternative, it was submitted that petitioner became a citizen by the clear operation of the Act of May 24, 1934 five years after his entry into the United States in 1906. The application of this statute passed twenty-eight years after his birth finds justification in the comments of the Senate reporting committee:

> "Section 2 clarifies the present uncertainties of the law so that naturalization of an alien mother will confer citizenship upon her minor children born abroad who are admitted for permanent residence. The present law appears to confer citizenship upon such children but the uncertainty in the law makes necessary the clarifying language of the present bill." *U.S. ex rel. Guest* v. *Perkins*, D.C. D.C., 17 F. Supp. 177, 181.

The language was clarified to read:

> "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of . . . resumption of American citizenship by the father or the mother: Provided, that such . . . . resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States." (Appendix, p. 4a)

The Court of Appeals for the Seventh Circuit rejected the dual alternatives holding that ". . . in this case plaintiff's mother never lost her citizenship, and there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization." (R. 55) This holding is directly inapposite to the rationale of *Petition of Black*, D. Minn., 64 F. Supp. 518, which held:

> ". . . It is difficult to believe, therefore, that, under these circumstances, Congress intended, by the passage of the Act of September 22, 1922, to render the citizenship rights of a child born to a marriage after

that date less favorable than they would have been if the mother had married prior to September 22, 1922. While Mrs. Black could not become naturalized in judicial proceedings and thereby bestow citizenship rights upon her alien child because she had never lost her American citizenship, she could, however, to all practical purposes, resume her American citizenship by returning permanently to the United States and terminating the marriage relationship with her alien husband. Whether, under these circumstances, the resumption of citizenship is termed "fictional" or "real" is of no particular significance. Congress intended that when a mother or father of an alien minor child became an American citizen and the child returned to this country for permanent residence, then the rights of American citizenship should be conferred on the minor child as provided in the Act of May 24, 1934. No sound reason is suggested why any distinction should be made for citizenship purposes under this statute between the mother of an alien child becoming an American citizen, and the mother, a citizen, returning to the United States during the minority of the child for permanent residence and terminating the marriage with the alien father. Here, the factual, situation meets every requirement of the statute. The child was born an alien. The mother remained a citizen and freed herself from the bonds of marriage with the alien father by returning to this country for permanent residence and obtaining a divorce. The child has permanently resided here for over five years. The resumption of American citizenship by the mother under these circumstances is just as real and effective within the intent of the Act of May 24, 1934, as if she had been married prior to September 22, 1922. Certainly her status as an American citizen, insofar as that would bestow rights upon the minor child is concerned, was the same. It seems clear, therefore, that the factual basis which Congress contemplated as a condition precedent to the granting of citizenship to an alien minor child has been fully attained.

To hold otherwise would be to unduly emphasize form rather than substance . . ." *Petition of Black,* 64 F. Supp. 518, 520-521.

Similarly in *Matter of Coll y Picard,* 37 Ops. Atty. Gen., 1 90, William D. Mitchell, then Attorney General, held a foreign born child, Fernando Coll y Picard, to have derived citizenship through its citizen mother even though she had never lost her citizenship. The opinion held that so far as the citizenship of her child is concerned, Mrs. de Coll should be treated as precisely in the same situation as one who had resumed her citizenship.

It is recognized that a certain emphasis is placed on the dissolution of the marriage in the *Black* case. We submit such emphasis is occasioned by the factual circumstances of that case. It is certainly not occasioned by a clear and plain reading of Section 5 of the Act of May 24, 1934, under which it was decided. In any event, it cannot be denied that, in the case of a widowed or divorced mother, the citizenship of the minors in her custody would follow her citizenship. The contention here is that petitioner did acquire American citizenship by virtue of his mother's nationality and resumption of residence even though his father was then living and in the absence of any decree or arrangement that his mother should have the custody of him. To a similar contention the District Court of the District of Columbia admitted that the "answer to that is not without some doubt." *Kletter* v. *Dulles,* 111 F. Supp. 593, 597. There is no basis in law or reason, where all other acts including custody, residence and separation, are the same, excepting absolute divorce or death, there should not be equal and like derivation of citizenship.

Further, in *Matter of Owen,* 36 Ops. Atty. Gen'l 197 and in *Petition of Drysdale,* D.C. Mich. 20 F. 2d 957, the

native born mothers respectively were naturalized and resumed their American citizenship many years before the deaths of their alien husbands. It seems clear enough that neither child derived citizenship through the resumption or naturalization of their mothers, which occurred while both parents were living and residing together in the marital relationship. Similarly, in *United States ex rel. Guest* v. *Perkins,* D.C. D.C., 17 F. Supp. 177, the child's native born mother and his alien father had separated by mutual consent under an agreement in which the custody of the child was given the mother. It was held that the child derived United States citizenship when the mother resumed citizenship.

Does it not offend against, not only equity and good conscience, but common sense, that a child of Prussian parents, all born in Prussia, should be recognized as an American citizen because his later widowed Prussian mother married a naturalized citizen, whereas, this petitioner, the child of a native born citizen and of resident parents, who knows nothing of Italy, its people, its language, its customs, should be considered a citizen and subject of Italy? Compare *United States* v. *Kellar,* C.C. Ill. 13 F. 82.

Petitioner was in the undisputed personal and sole actual custody of his mother for the first six months of his life, covering a period immediately before and after his entry in the United States. That this custody later was shared by his father does not affect his status upon entry. The attorney general had occasion to remark (*Matter of Coll y Picard,* 37 Ops. Atty. Gen'l 90, 95) that even a legal order for custody is not necessarily permanent.

IV.

RESTRAINT UPON THE FREEDOM OF LOCOMOTION AND TRAVEL OF PETITIONER'S CITIZEN MOTHER, THROUGH ERRONEOUS INTRUSION OF AN EXECUTIVE OFFICER OF THE UNITED STATES CANNOT BE AVAILED OF TO DEPRIVE THE PETITIONER OF AMERICAN NATIONALITY.

The petitioner was born on June 20, 1906. Under commonly accepted concepts he was conceived in mid-September of 1905. His mother left the United States in January, 1906, then four months pregnant. In March, when six months pregnant, the consul refused to allow her, and her unborn child to return to the United States, the place of her nationality and domicile. Until subsequent to his birth, petitioner and his United States citizen mother were prohibited from entering the United States. It was our submission to the lower courts that the rights of the petitioner were seriously encroached upon by an officer of the United States, and the Courts of the United States should act to rectify the wrong; that this petitioner, having been conceived in the United States, should be considered in being from the time of conception.

The Courts have been consistent and assiduous in rectifying such errors and in translating desire and attempt, wrongfully frustrated by a government official, into fact. Illustratively, we refer the Court to *Dos Reis ex rel. Gamara* v. *Nichols*, 1 Cir., 161 F. 2d 860 where the native born Camara, living in the Azores, got his draft notice into the Portuguese Army. Someone at the American consulate told him that if he wanted to join the American Army and avoid service in the Portuguese Army, he should return to America, which he was without means to do. To an administrative determination that he had expatriated himself by service in the Portuguese Army, the Court

made a finding that such service was involuntary and under duress and that he was still a citizen of the United States. In *Podea* v. *Acheson*, 2 Cir., 179 F. 2d 306, the application of the native born Podea for a passport was denied on the ground that Podea's citizenship was renounced when his father registered as a Roumanian. The Court found that the State Department's erroneous refusal of a passport led to Podea's being compelled to serve in the Roumanian Army. The Court of Appeals for the Seventh Circuit, itself, has held that "Certainly, the Government should not be heard to contend that a plaintiff has been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or wilfully prevented his doing. . . ." *Lee You Fee* v. *Dulles*, 236 F. 2d 885, 887.

There can remain little doubt that a consul's refusal to issue a passport to persons seeking to return to the United States is a denial of a right or privilege as a citizen of the United States. *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753. However, the Seventh Circuit found "the action of the American Consul in Naples . . . not sufficient as a matter of law, to grant citizenship to plaintiff. The cases cited by plaintiff relate to native born citizens: the issues there were voluntary expatriation. These holdings do not control the situation here." (R. 55) The basis for the decision is without merit, see *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753; *Lee Bang Hong* v. *Acheson*, D. Hawaii, 110 F. Supp. 49, 50; *Lee Hong* v. *Acheson*, D.C. Cal., 110 F. Supp. 60, wherein the plaintiffs were all naturalized citizens within the contemplation of the Fourteenth Amendment and none had been expatriated.

The government submits, as its only resistance to our submission on this point, that (1) in 1906 an American passport was not a necessary document for United States citizens wishing to come to the United States, that no entry document was required prior to May 22, 1918. We submit this is an unusual forum in which to raise the argument for the first time. We, further, submit that the argument is inconclusive. It does not take into account the requirements of Italian law affecting those persons who wished to leave Italy. The government also submits (2) that the facts testified to by the petitioner's mother, relative to this point, are incredible. The record evidences no incredulity on the part of the trial judge. We submit that both arguments submitted by the government are insubstantial.

CONCLUSION.

WHEREFORE, for the forgoing reasons, it is respectfully submitted that the judgment below be reversed and this cause remanded with instructions for the entry of a judgment declaring petitioner to be a Citizen of the United States.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner.

APPENDIX.

ACT OF APRIL 14, 1802, 2 Stat. 155.

Sec. 4, And be it further enacted, That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided*, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States: Provided, also, that no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain, during the late war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the state in which such person was proscribed.

REVISED STATUTES OF 1874.

Sec. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of

the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed.

Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were and may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

ACT OF MARCH 2, 1907, 34 Stat. 1228, 1229.

Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And Provided further*, That the citizen-

ship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

ACT OF MAY 24, 1934, 48 Stat. 797.

An Act to amend the law relative to citizenship and naturalization, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1993 of the Revised Statutes is amended to read as follows:

"Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

Sec. 2. Section 5 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad", approved March 2, 1907, as amended, is amended to read as follows:

"Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: *Provided*, That such naturalization or resumption shall take place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

FILE COPY

No. 198

In the Supreme Court of the United States

OCTOBER TERM, 1960

MAURO JOHN MONTANA, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 50–56) is reported at 278 F. 2d 68.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1960 (R. 56). A petition for rehearing was denied on May 26, 1960 (R. 57). The petition for a writ of certiorari was filed on June 29, 1960, and was granted on October 17, 1960, 364 U.S. 861 (R. 57). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner, who was born in Italy in 1906 of a citizen mother and an alien father, was a citizen of the United States at birth, or became a citizen on his mother's return to the United States in 1906.

STATUTES INVOLVED

R.S. 2172 (1878 ed.), which is substantially the Act of April 14, 1802, 2 Stat. 153, Section 4, provided in pertinent part:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; * * *.

R.S. 1993 (1878 ed.), which is substantially the Act of February 10, 1855, 10 Stat. 604, Section 1, provided:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to

children whose fathers never resided in the United States.

Sections 3 and 5 of the Act of March 2, 1907, 34 Stat. 1228–1229, provided:

> SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.
>
> SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided,* That such naturalization or resumption takes place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

The Act of May 24, 1934, 48 Stat. 797, provided:

> That Section 1993 of the Revised Statutes is amended to read as follows:
>
> "SEC. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United

States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

SEC. 2. Section 5 of the Act entitled "An Act in reference to the expatriation of citizens and their protection abroad", approved March 2, 1907, as amended, is amended to read as follows:

"SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the father or the mother: *Provided,* That such naturalization or resumption shall take place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States."

* * * * *

STATEMENT

Petitioner was ordered deported by the Immigration and Naturalization Service after a hearing. He then brought this action for a declaratory judgment of United States citizenship in the District Court for the Northern District of Illinois, pursuant to Section 360 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1503 (R. 6–12, 41–44). At the conclusion of the case, the district court found that petitioner had not acquired United States citizenship at birth by virtue of the Constitution or any statutory enactment. (R. 35, 38–40). On appeal, the court of appeals affirmed the judgment of the district court (R. 50–56).

The pertinent facts may be summarized as follows:

Petitioner's mother was a native-born United States citizen, having been born in the United States in 1890, and his father an Italian national. The parents were married in the United States on August 26, 1905 (R. 20–21). The father was never naturalized in this country and has remained an alien up to the present time (see R. 50). On February 2, 1906, petitioner's parents traveled to Italy for a visit (R. 22; see R. 23). At that time, petitioner's mother was a few months pregnant (with the petitioner). On June 26, 1906, petitioner was born in Acerra, Italy (R. 24, 39).

At the trial, petitioner's mother testified that, before the petitioner was born, she tried to get a United

States passport to return to the United States, but that the American consul at Naples did not think that she should return to this country while she was pregnant (R. 22–24). She obtained the passport with no difficulty after the petitioner was born (R. 25). She also testified that she and her husband quarreled in Italy, that he returned to the United States about two and a half months before petitioner was born, that she returned to the United States with the petitioner on September 19, 1906, and that she and her husband were separated an additional three months in this country (R. 24–27, 33). She and her husband have lived together from that time up to the time of trial, and five additional children were born to them in the United States (R. 26, 28–29, 34).

SUMMARY OF ARGUMENT

Petitioner was not granted citizenship by any of the three statutes he invokes.

I

At the time of petitioner's birth in Italy in 1906, two statutes—R.S. 1993 and R.S. 2172—dealt with the acquisition of United States citizenship by foreign-born children of Americans. R.S. 1993, which was an 1874 re-enactment of the Act of February 10, 1855, 10 Stat. 604, conferred citizenship upon those foreign-born children "whose fathers were or may be at the time of their birth citizens thereof." By its terms, R.S. 1993 applied to children "heretofore born or hereafter born" outside the United States. Admittedly, it does not apply to petitioner because his father was not a citizen.

R.S. 2172, a re-enactment in 1874 of Section 4 of the Act of April 14, 1802, provided that "children of persons *who now are, or have been,* citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof * * *" (emphasis added). That clause required both parents to have been citizens of the United States, and in addition was always construed as not being prospective in application. In fact, the reason for the enactment of the 1855 Act (R.S. 1993), *supra,* pp. 2–3, was that the second clause of the 1802 Act was not prospective. Throughout the histories of the naturalization and citizenship legislation which followed the 1874 re-enactments of the 1802 and 1855 legislation, Congress took it for granted that the second clause of R.S. 2172 was not prospective, pointing out that the citizenship status of foreign-born children was determined by the citizenship of their fathers, and that R.S. 1993 was the exclusive statute which currently applied to the situation of such foreign-born children. H. Rep. No. 1110, 67th Cong., 2d Sess.; H. Rep. No. 131, 73d Cong., 1st Sess., and S. Rep. No. 865, 73d Cong., 2d Sess.

Moreover, if petitioner's construction of R.S. 2172 were adopted, there would be a direct conflict between R.S. 2172 and R.S. 1993, since the foreign-born children of "persons" (including *mothers*) who now are citizens would be citizens under R.S. 2172, while R.S. 1993 confers citizenship upon those foreign-born children whose *fathers* were citizens at the time of their birth. Petitioner's proposed construction that "persons" in R.S. 2172 could mean "mother" alone would

conflict with R.S. 1993 making the "father" the focal point of citizenship. Moreover, it would mean that citizenship could be transmitted by a mother who had never resided in the United States, contrary to the explicit requirement of prior residence which appears in every other enactment on the subject. The duty of the courts is to "reject any construction which would make one section inconsistent with another relating to the same general subject." *United States* v. *Kellar*, 13 Fed. 82, 83–84 (S.D. Ill.).

II

Section 3 of the Expatriation Act of 1907, 34 Stat. 1228–1229, provided for the expatriation of any American woman who married an alien, but also provided that, on the termination of the marital relation, the woman could resume her American citizenship on fulfilling certain requirements. Section 5 of that Act conferred citizenship upon the foreign-born children whose "parent" "resumed" American citizenship or became naturalized during the minority of the child. Although the 1907 Act was not specifically retrospective in application (41 Cong. Rec. 1466), petitioner contends that he became a citizen under Section 5 of the 1907 Act because his mother, in 1906, "resumed" her "residence" in the United States.

Although there is a split of authority as to whether an American woman lost her citizenship on her marriage, without more, to a foreigner prior to 1907 (compare *In re Page*, 12 F. 2d 135 (S.D. Cal.), with *In re Fitzroy*, 4 F. 2d 541 (D. Mass.)), the weight of authority was that marriage caused a forfeiture of

American citizenship only when accompanied by a change of domicile abroad. Both sides agree that since petitioner's parents were married in 1905—before the enactment of the Expatriation Act of 1907—and since there was no change of domicile abroad (the 1906 trip to Italy being only for a visit), petitioner's mother did not lose her United States citizenship on her marriage. Petitioner, therefore, could not acquire citizenship benefits on his mother's resumption of residence in 1906 since, not having lost her citizenship, there was no possibility of a *resumption* of citizenship on her return to the United States. *Petition of Black,* 64 F. Supp. 518 (D. Minn.).

Moreover, if petitioner's mother had lost her citizenship in 1906, she could not have resumed it on returning to the United States in that year because there was no termination of the marital relation with the alien husband, petitioner's father. The plain words of the 1907 Act, as well as its legislative history, show that Congress intended to allow the woman (whose marriage caused the loss of United States citizenship) to resume her United States citizenship when the impediment was removed by termination of the marriage. The mere fact that petitioner's mother and father are alleged to have lived apart for about six months after the petitioner was born, and that petitioner returned to the United States with his mother alone in 1906, did not bring about a "termination" of the marital relationship within the contemplation of the statute. The mother testified that they became reconciled later in 1906, and have lived together in the marital relationship down to the

present time. There was thus no termination of the marital relationship by death of the husband, or divorce, or, at the very least, by mutual separation with absolute custody of the child in the wife (see *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177 (D.D.C.)), within the contemplation of the 1907 Act.

Finally, it should be noted that the statute does not confer citizenship upon the foreign-born child whose "parent" merely resumes a "residence" in the United States. Section 5 confers citizenship upon such children, following upon a resumption of lost citizenship—not merely of residence—on the part of the parent. Even if petitioner's mother changed her residence in 1906, he could claim nothing under the Act.

III

Section 2 of the Act of May 24, 1934, 48 Stat. 797, amended Section 5 of the Expatriation Act of 1907, to provide for the citizenship of foreign-born children whose "father or * * * mother" resumed United States citizenship or became naturalized during the minority of the children. Petitioner contends that, "by virtue of his mother's nationality and resumption of residence," he became a citizen of the United States under Section 2 of the 1934 Act.

The same reasons which operate to deny petitioner relief under Section 5 of the 1907 Act likewise deny him relief under Section 2 of the 1934 Act, for Section 2 was adopted only for purposes of "clarif[ying] the present uncertainties of the law [Section 5 of

the 1907 Act]." S. Rep. No. 865, 73d Cong., 2d Sess., at p. 1; H. Rep. No. 131, 73d Cong., 1st Sess., at p. 2. Petitioner cannot derive citizenship under the 1934 Act, as under Section 5 of the 1907 Act, because (1) his mother never lost her citizenship and, hence, did not "resume" citizenship under Section 3 of the 1907 Act or Section 2 of the 1934 Act; (2) if his mother had lost her citizenship on her marriage to an alien in 1905, there could be no resumption of her United States citizenship until there had been a "termination" of the marital relation, a fact not present in this case; (3) the 1907 and 1934 Acts do not confer citizenship upon a minor child whose mother merely "resumes" her "residence" in the United States, nor does it allow a woman to resume her citizenship simply upon such a resumption of residence; citizenship could come through the mother only if, having lost her citizenship through marriage to a foreigner, she "resumed" such citizenship on a termination of the marital relationship.

IV

In the district court, petitioner's mother testified that, after spending about a month and a half in Italy in early 1906, she desired to return to the United States. She went to a "little town", accompanied by her parents, to obtain passports, but the official on duty referred her (but not her parents) to the United States consul at Naples. When she subsequently applied for a passport there, the consul "just took one look at me and he says, 'I am sorry, Mrs., you cannot in that condition * * *.' 'You come back after you

get your baby'" (R. 23). Petitioner contends that he should be deemed a citizen because the alleged misconduct of the consul prevented him from being born in the United States. There is no merit to this claim.

In the first place, the trial judge, as fact finder, does not appear to have credited the claim that Mrs. Montana was denied a passport. He understood that petitioner was claiming estoppel, at least in part, but nevertheless dismissed the action at the conclusion of the case, finding that petitioner had not sustained his burden of proof (R. 35, 39–40, 47). The fact finding body, particularly in citizenship and allied cases, "need not accept uncontradicted testimony when good reasons appear for rejecting it, such as the interest of the witness, and improbabilities and important discrepancies in the testimony." *Yip Mie Jork* v. *Dulles,* 237 F. 2d 383 (C.A. 9); *Flynn ex rel. Yee Suey* v. *Ward,* 104 F. 2d 900 (C.A. 1). Petitioner's mother had an interest, and a major one, in the outcome of petitioner's suit for declaratory relief.

Moreover, the testimony of petitioner's mother does not indicate that she was actually *denied* a passport but rather, at most, that the consul suggested to her that she wait until her child was born before traveling back to the United States. Her testimony is quite consistent with the consul's having suggested to her that she wait for her child to be born; the words, "you cannot in that condition", could quite easily mean no more than, "you're not well enough to travel from here to the United States in that condition and should wait until after the birth".

It seems incredible that the consul would have denied a passport to Mrs. Montana since, in 1906, there was no requirement for a citizen, on entering or returning to the United States, to obtain a passport. See *Kent* v. *Dulles*, 357 U.S. 116. There would thus be no occasion for petitioner's mother to apply for a passport, save possibly the one now advanced by petitioner that Italian law might have affected "those persons who wished to leave Italy" (Pet. Br. 30). But the record and briefs are barren of any requirement of Italian law that a passport was necessary or that petitioner's mother thought that she had to have a passport for her return to the United States. In any event, there is no reason to believe that, if Italy required a passport, the consul would have denied one, especially since it was unnecessary under American law.[1]

Finally, even if the claim of passport denial were accepted, the conduct on the part of the American consul would be insufficient, as a matter of law, to

[1] The unlikelihood of a denial of a passport by the consul is further emphasized by Mrs. Montana's testimony that her father was a citizen of the United States, and that her parents—both father and mother—obtained their respective passports in the "little town", but that, since the people there could not find her name, "they said * * * [that she] had to go to the American Consul" to get her "passport" (R. 22, 24). The father could not have obtained his American passport in the "little town", since, at that time, only "diplomatic or consular officers of the United States * * * and no other person" could issue or verify passports in foreign countries. R.S. 4075. The office in the "little town" was not a diplomatic or consular office because the people there sent petitioner's mother to the "American Consul" for her passport (R. 22). And, if it were, the sending of petitioner's mother to the "American Consul" for her passport would have been unnecessary.

estop the government from contesting petitioner's claim to citizenship. There is no showing that Mrs. Montana (who presumably did not have a passport when she left the United States since that passport would have been valid for a year and there would have been no need for her to secure one in Italy), thought that she had to have a passport in order to return to the United States, and in fact she did not need one. And if the consul had granted the passport, there would have been no assurance that petitioner would have been born in the United States. The controlling authorities preclude the government from relying upon improper conduct of government officials only when such conduct directly causes loss of citizenship rights. They are inapposite here, for the alleged misconduct in this case—even if it be conceded to exist—did not directly lead to petitioner's birth in Italy.

ARGUMENT

Since petitioner was born in Italy, he has no claim to American citizenship under the first section of the Fourteenth Amendment. *United States* v. *Wong Kim Ark*, 169 U.S. 649. He must rest his claim solely on some Congressional enactment granting citizenship to individuals in his class, "for, wanting native birth, [he] can not otherwise become a citizen of the United States." *Zartarian* v. *Billings*, 204 U.S. 170, 173; see also *United States* v. *Wong Kim Ark, supra*, at 668, 702. We show that he has no claim under the controlling legislation at the time of his birth, R.S. 1993; that none of the three statutes which he invokes is applica-

ble to his case; and therefore that he has never been and is not now a citizen of the United States. Petitioner appeals (Br. 20) to considerations of equity, but such considerations do not authorize a gift of citizenship which Congress did not confer.

I. PETITIONER DID NOT ACQUIRE UNITED STATES CITIZENSHIP UNDER THE SECOND CLAUSE OF SECTION 2172 OF THE REVISED STATUTES

Petitioner's principal claim is rested on the second clause of R.S. 2172, *supra*, p. 2, which provides that "the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." This provision, however, is of no aid to petitioner, because it requires both parents to have been Americans, because it was not intended to operate prospectively, and because in any event it was not intended to affect individuals whose parents had not been citizens by the time of its enactment.

A. THE BACKGROUND AND CONTEXT OF R.S. 2172 AND R.S. 1993.

At common law, citizenship status was grounded upon the principle of *jus soli*, which declared that all persons (with certain exceptions not material here) born within the allegiance and jurisdiction of the King were natural-born subjects. The acquisition of citizenship through descent—the principle of *jus sanguinis*—is foreign to the principles of the common law and is based wholly upon statutory enactments. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702; see *Zartarian* v. *Billings*, 204 U.S. 170, 173. In Eng-

land, the statute of 25 Edward III, Stat. II (1350) conferred the rights of nationality upon foreign-born children of natural-born subjects; and by the statute of 13 George III, c. 21 (1773) those rights were extended to foreign-born grandchildren of natural-born subjects.

Congress, by successive statutes, has made provision for the admission to citizenship of certain foreign-born children, among them (1) foreign-born children of American citizens and (2) minor children dwelling within the United States whose parents became naturalized citizens. Although Congress was primarily concerned with the citizenship status of foreign-born children of "American parents" (1 Annals of Congress, 1st Cong., 1st Sess., p. 1121), the Act of March 26, 1790, 1 Stat. 103–104, provided for the citizenship of minor children whose parents became naturalized citizens, as well as for the citizenship of foreign-born children of citizen parents. This statute provided in pertinent part (1 Stat. 104):

> And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided,* That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States. * * *

Although the Act of January 29, 1795, 1 Stat. 414–415, expressly repealed the 1790 Act, the above provisions of the 1790 Act were re-enacted almost verbatim in Section 3 of the 1795 Act. Compare 1 Stat. 104 with 1 Stat. 415; *Weedin* v. *Chin Bow*, 274 U.S. 657, 661–662. The Act of June 18, 1798, 1 Stat. 566–569, amended the 1795 Act with respect to the registration and naturalization of aliens in this country. Shortly thereafter, Congress enacted the controversial "Act concerning Aliens"; which sanctioned the removal of certain aliens in the country and subjected them to penalties and restrictions. Act of June 25, 1798, 1 Stat. 570–572; H. Rep. No. 108, 5th Cong., 2d Sess., May 1, 1798, reported in 37 *Am. State Papers*, Misc. 1, 1789–1809, Class X, p. 180.[2] This latter Act, however, was not enforced, and was not renewed by Congress when its two-year life expired under Section 6. See 1 Stat. 572; Gordon and Rosenfield, *Immigration Law and Procedure* (1959 ed.), pp. 5, 394.

The Act of April 14, 1802, 2 Stat. 153–155, revised the naturalization and citizenship laws of the United States and, in Section 5, repealed "all acts heretofore passed respecting naturalization." The 1802 Act, therefore, repealed the 1795 Act (which had itself re-

[2] For the history of this statute in Congress, see *Abridgement of the Debates of Congress*, 1796–1803 (1857 ed.), Vol. II, pp. 276–280; H. Rep. No. 108, 5th Cong., 2d Sess., May 1, 1798, reported in 37 *Am. State Papers*, Misc. 1, 1789–1809, Class X, p. 180. See also H. Rep. No. 125, 6th Cong., 1st Sess., March 14, 1800 reported in 37 *Am. State Papers*, Misc. 1, 1789–1809, Class X, p. 208.

pealed the 1790 Act) and the Naturalization Act of June 18, 1798 (which amended the 1795 Act). The 1802 Act did not repeal "the hated Alien and Sedition laws, the so-called Nationality Act of 1798", as petitioner contends (Pet. Br. 11). As just indicated, the controversial "Act concerning Aliens", enacted on June 25, 1798, *expired* according to its own terms long before the 1802 Act was passed.

Section 4 of the 1802 Act provided (in relevant part) (2 Stat. 155):

> That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided,* that the right of citizenship shall not descend to persons whose fathers have never resided within the United States. * * *

The first clause of this Section 4 was a substantial reenactment of the provisions of Section 3 of the 1795 Act, which conferred citizenship upon minor children (dwelling in the United States) whose parents were naturalized. Compare 1 Stat. 415 with 2 Stat. 155.

See H. Doc. No. 326, 59th Cong., 2d Sess., at p. 77. The second clause of Section 4—"and the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States," coupled with the proviso—was a substantial re-enactment of the remainder of Section 3 of the 1795 Act, which conferred citizenship on the foreign-born children of "citizens of the United States." Compare 1 Stat. 415 with 2 Stat. 155. Actually, the second clause of the 1802 Act went further than Section 3 of the 1795 Act, for it conferred citizenship upon the children "of persons who now are, or *have been citizens* of the United States" (emphasis added), while Section 3 of the 1795 Act required that the parents *be citizens* at the time of the birth of the child.

In 1854, Mr. Horace Binney wrote a lengthy article entitled, *The Alienigenae of the United States,* published in 2 American Law Register 193, in which he pointed out that the second clause of the 1802 Act was not prospective in application and that, therefore, foreign-born children of American parents who were not citizens on or before April 14, 1802, were aliens. In 1855, apparently in response to Mr. Binney's article,[3] Congress enacted a statute, which was

[3] Two expressions by this Court support the assumption that the 1855 legislation was enacted to correct the defect in the 1802 law found by Mr. Binney. *United States* v. *Wong Kim Ark*, 169 U.S. 649, 674; *Weedin* v. *Chin Bow*, 274 U.S. 657, 663, 664. See also *Ying* v. *Cahill*, 81 F. 2d 940 (C.A. 9); *Guest* v. *Perkins*, 17 F. Supp. 177, 179 (D.D.C).

both prospective and retrospective in application, and which conferred the rights of citizenship upon those foreign-born children whose *fathers* were United States citizens at the time of their birth. The Act of February 10, 1855, 10 Stat. 604, provided:

> That persons *heretofore born, or hereafter to be born,* out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States; shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided, however,* That the rights of citizenship shall not descend to persons whose fathers never resided in the United States. [Emphasis added.]

In the debates which preceded the 1855 Act, Congressman Cutting of New York, who sponsored the bill, pointed out that the second clause of the 1802 Act was "not prospective in its terms", and that it applied only to children born abroad up to and including April 14, 1802, and not afterwards, "so that the children of a man who happened to be in the world on the 14th of April, 1802, born abroad, are American citizens, while the children of persons born on the 15th of April, 1802, are aliens to the country." 32 Cong. Globe 170, 33d Cong., 1st Sess., January 13, 1854. Other Congressmen expressed the view that the legislation was "pre-eminently worthy of adoption" and that the bill "remedies a very glaring defect in the existing law." *Id.* at 171.

In revising and codifying the federal statutes, Congress, in 1874, re-enacted the 1802 Act and the

1855 Act into the Revised Statutes of the United States. R.S. 2172 is a substantial re-enactment of the 1802 Act, except that the proviso "that the right of citizenship shall not descend to persons whose fathers have never resided within the United States" (in the 1802 Act) was omitted. R.S. 2172 reads:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; * * *.

R.S. 1993, a substantial re-enactment of the 1855 Act, provided:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.*

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*Under R.S. 1993, the father must have resided in the United States at some period prior to the birth of the foreign-born child. *Weedin* v. *Chin Bow*, 274 U.S. 657, 667–668, 675;

B. THE SECOND CLAUSE OF R.S. 2172 REQUIRED BOTH PARENTS TO BE CITIZENS, AND IN ANY CASE WAS NEVER INTENDED TO BE CONSTRUED AS PROSPECTIVE

Petitioner does not claim that he was born a citizen under the provisions of R.S. 1993, *supra*, pp. 2–3. He cannot make such a claim, for his father was not a citizen at the time of his birth in 1906 (and is not now a citizen). R.S. 1993; *United States ex rel. Abdoo* v. *Williams*, 132 Fed. 894, 895 (S.D.N.Y.). See *Weedin* v. *Chin Bow*, 274 U.S. 657, 666; *Wolf* v. *Brownell*, 253 F. 2d 141, 142 (C.A. 9), certiorari denied, 357 U.S. 942; *MacKay* v. *McAlexander*, 268 F. 2d 35, 38–39 (C.A. 9), certiorari denied, 362 U.S. 961; *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177, 179 (D.D.C.).

Rather, petitioner asserts (Pet. Br. 7–18) that he was born a citizen by virtue of the second clause of R.S. 2172, which grants citizenship to the "*children of persons who now are,* or have been, citizens of the

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Kong Din Quong v. *Haff*, 112 F. 2d 96 (C.A. 9), certiorari denied, 311 U.S. 706; *Hom Ark* v. *Carr*, 105 F. 2d 607, 608 (C.A. 9); *Wong You Henn* v. *Brownell*, 207 F. 2d 226, 227 (C.A. D.C.).

[5] R.S. 1993 was amended by the Act of May 24, 1934, to provide for citizenship to children "*hereafter* born" abroad whose "father or mother", or both, were citizens at the time of the birth of the children (emphasis added), but the amendment was thus made solely prospective in application. 48 Stat. 797; S. Rep. No. 865, 73d Cong., 2d Sess., and H. Rep. No. 131, 73d Cong., 1st Sess., at pages 1 and 2, respectively; *Lee Chuck Ngow* v. *Brownell*, 152 F. Supp. 426, 427 (E.D. Wisc.). See *supra*, pp. 3–4; *infra*, pp. 49 ff.

R.S. 1993 and R.S. 2172 were expressly repealed by Section 504 of the Nationality Act of 1940, 54 Stat. 1137, 1172.

United States" (emphasis added). He argues (Pet. Br. 8, 10–11) that the word "persons", means "any person", and also that the clause must be given prospective application from its re-enactment in 1874 to at least the date of his birth in 1906. Neither contention finds support in the language of the statute or in the various constructions adopted by the commentators and courts.

1. *The words, "persons who now are * * * citizens," require both parents to be citizens.*

(*a*) In both the first and second clauses of the 1802 Act (re-enacted as R.S. 2172) Congress used the plural, "persons." This use of the plural seems to have been deliberate. As we have indicated (*supra*, pp. 16–19), the 1802 Act was, in essence, a re-enactment of the provisions of Section 3 of the 1795 Act, which in turn was a re-enactment of the 1790 Act. Section 3 of the 1795 Act also conferred citizenship upon "the children of *persons* duly naturalized", and upon the foreign-born "children of *citizens* of the United States" (emphasis added). Compare 1 Stat. 104 and 415, with 2 Stat. 155. As early as 1790, sentiment was expressed in Congress that provision ought to be made for the benefit of foreign-born children of *"American parents"* (emphasis added). 1 Annals of Congress, 1st Cong., 1st Sess., at p. 1121. The plural was likewise used in the legislative reports on the 1802 Act. Section 4 of that Act is an almost verbatim copy of the Senate Committee Report which used the plural, "persons". See the Senate Report, "Amendments reported by the committee, to bill,

naturalization, March 18, 1802", 7th Cong., 1st Sess. On March 26, 1802, the Senate Committee reported out certain other amendments, not here important, but the Committee was basically satisfied with Section 4 of the bill (the provision pertinent to this case, see *supra*, p. 18). See the Senate Report, March 26, 1802, 7th Cong., 1st Sess.[6] The House of Representatives and the Senate fully considered the 1802 naturalization bill prior to its passage on April 14, 1802, and were substantially satisfied with Section 4 as reported out of the Senate Committee on March 18, 1802.[7] See Senate Journal, 1799–1805 (1821 ed.), pp. 191, 193, 194, 195, 196–197, 201, 202–203, 209, 211, 213; House Journal, 7th Cong., 1st and 2d Sess., pp. 70–71, 121, 123, 127, 129, 184, 187–188, 190, 191, 193–194, 200–201.

(*b*) Although our research has been unable to discover any judicial decisions construing the second clause of the 1802 Act (re-enacted in R.S. 2172),

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[6] There were no House reports accompanying the 1802 Act. The Senate reports are not bound, and may be found in the Archives of the United States.

[7] The only real change which was made in Section 4, as reported out of the Senate Committee on March 18, 1802, was that the proviso prohibiting citizenship status to those children whose fathers renounced their United States citizenship during the infancy of their children was eliminated from the enactment. The Committee's version of the proviso was that "the right of Citizenship shall not descend to persons whose fathers have never resided within the United States or who having been Citizens of the United States, shall have renounced that character during the infancy of such children." Only the first portion of this proviso—precluding the descent of citizenship "to persons whose fathers have never resided within the United States"—was enacted into law. See 2 Stat. 155.

legal scholars who studied that clause apparently came to the conclusion that "children of persons" meant children of citizen parents (both mother and father), or children of citizen *fathers* alone. In the 14th edition of 2 Kent, *Commentaries*, edited by John Gould (1896), the following construction of the second clause of the 1802 Act was offered (p. 53):

> This clause is certainly not prospective in its operation, whatever may be the just construction of the one preceding it. It applied only to the children of persons who *then were* or *had been* citizens [emphasis in original]; and consequently the benefit of this provision narrows rapidly by the lapse of time, and the period will soon arrive when there will be no statutory regulation for the benefit of children born abroad, of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law. *The proviso annexed to this last provision seems to remove the doubt arising from the generality of the preceding sentence, and which was, whether the act intended by the words, "children of persons," both the father and mother, in intimation of the statute of 25 Edw. III, or of the father only, according to the more liberal declaration of the statute of 4 Geo. II.* The provision also differs from the preceding one, in being without any restriction as to the age or residence of the child; and it appears to have been intended for the case of the children of natural-born citizens, or of citizens who were original actors in our Revolution, and therefore it was more compresensive

and more liberal in their favor. [Emphasis added.]

It should be noted that this is a liberal interpretation of the clause. The view is that, since the proviso following and modifying the second clause operates to deny citizenship to foreign-born children whose *fathers* have never resided in the United States, "persons" in the second clause may mean the *father* alone. See, also, Binney, *The Alienigenae of the United States,* 2 American Law Register 193, 207–208 (February 1854). Since petitioner's father is not now and never was a United States citizen, regardless of whether or not the second clause of the 1802 Act (re-enacted in R.S. 2172) is prospective in application so as to cover petitioner's case, he cannot derive any benefit from that clause.

(*c*) Petitioner seeks to avoid the plural language in the second clause of R.S. 2172, and the historical connection of that provision with the *father's* citizenship, by arguing that the same word, "persons," used in the first clause of R.S. 2172, *supra,* p. 2, has been interpreted to mean "either father or mother, and that a mother is enabled to pass citizenship to her children through her naturalization in the United States even though the father is an alien" (Pet. Br. 9). In support of this construction, petitioner cites four district court decisions and a 1929 opinion of the Attorney General of the United States. These authorities are, however, inapposite.

In *United States ex rel. Fisher* v. *Rodgers,* 144 Fed. 711 (E.D. Pa.) (1906), *In re Graf,* 277 Fed. 969

(D. Md) (1922); *In re Bishop*, 26 F. 2d 148 (W.D. Wash.) (1927), and *United States* v. *Kellar*, 13 Fed. 82 (S.D. Ill.) (1882), the natural fathers of the children, unlike the situation at bar, were dead. The respective alien mothers remarried United States citizens (*Bishop*, *Kellar*) or husbands who subsequently became naturalized United States citizens (*Fisher*, *Graf*). Since the mothers were married to citizen-husbands between February 10, 1855, and September 22, 1922 (the date of the Cable Act, providing that women retained their own nationality on marriage), the mothers were held to be citizens under R.S. 1994, which conferred citizenship upon "(a)ny woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized."[*] See *Kelly* v. *Owen*, 7 Wall. 496. When the courts declared the children in question to be citizens, not only were the natural mother and the stepfather United States citizens, but the mother was the only living natural "parent"—a situation at variance with that in the present case. *Fisher*, *supra*, 144 Fed. at 712; *Graf*, *supra*, 277 Fed. at 970; *Bishop*, *supra*, 26 F. 2d at 148–149; *Kellar*, *supra*, 13 Fed. at 84–85. Petitioner's claim that these authorities support the proposition that citizenship may be derived through the mother "even

[*] R.S. 1994 was a substantial re-enactment of Section 2 of the Act of February 10, 1855, 10 Stat. 604. R.S. 1994 was repealed by Section 6 of the Act of September 22, 1922 (the Cable Act), 42 Stat. 1021–1022. The 1855 Act was based upon the Act of 7 & 8 Victoria, c. 66 (1844). Van Dyne, *Citizenship of the United States* (1904 ed.), pp. 119–120.

though the father is an alien" (Pet. Br. 9) overlooks the simple fact that the natural father in each of the cited cases was dead. The conclusion of the courts was that the child should not be prevented from taking the citizenship of the only parent he had at the time. In *Citizenship of R. Bryan Owen,* 36 Op. Atty. Gen. 197 (1929), the alien father of the child had died subsequent to the naturalization of the mother. Attorney General Mitchell pointed out that, whatever the status of the child at the time of his mother's naturalization, "there can be, in my opinion, no doubt that he is now a citizen of the United States by reason of *his father's death* * * *" (emphasis added). *Id.* at 203. In sum, the authorities cited by petitioner have held, in construing the first clause of R.S. 2172, that "persons" in that clause means "mother" only when the father of the child is dead, and the mother subsequently becomes a citizen (by naturalization, or by marriage to a citizen under R.S. 1994) during the minority of the child—a situation not present in the instant case.

In several other cases where the courts have held that a child could derive citizenship through his mother (as a "person" under the first clause of R.S. 2172), they were careful to point out that the marital relationship with the alien husband had terminated (*i.e.,* by death or divorce) and the custody of the minor child was in the hands of the natural mother. In such cases, the minor child, if dwelling within the United States, became a citizen through the first clause of R.S. 2172 on the acquisition of United States citi-

zenship by his mother. See, *e.g.*, *Petition of Drysdale*, 20 F. 2d 957, 958 (E.D. Mich.); Van Dyne, *Citizenship of the United States* (1904 ed.), p. 118; Cockburn, *Nationality* (1869 ed.), p. 213.* See also *infra*, pp. 45–47, 52–55. But none of these constructions aids the petitioner whose parents had not terminated their marital relation during his minority.

The first clause of R.S. 2172 has been interpreted to allow derivation of citizenship through the father alone, despite the fact that the plural words are used—"children of persons". *In re Citizenship Status of Minor Children, etc.*, 25 F. 2d 210 (D.N.J.) (1928); Foreign Relations 1890, p. 301; H. Doc. No. 326, 59th Cong., 2d Sess., pp. 31, 33–35; Cockburn, *Nationality* (1869 ed.), p. 40. See also the Congressional debates on the Cable Act of 1922 (42 Stat. 1021), 62 Cong. Rec. 9044; *Zartarian* v. *Billings*, 204 U.S. 170,

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*After the adoption of Section 5 of the Act of March 2, 1907, which conferred citizenship upon a child whose "parent" became a United States citizen through naturalization proceedings or through "resumption" of United States citizenship lost through marriage of a citizen woman to an alien husband, "parent" was generally construed to mean that parent—either mother or father—having legal custody over the minor child. *In re Lazarus*, 24 F. 2d 243, 244 (N.D. Ga.); *Roa* v. *Collector of Customs*, 23 Philippine Rep. 315, 341; 3 Hackworth, *Digest of International Law* (1942 ed.), at p. 79; *Citizenship of R. Bryan Owen*, 36 Op. Atty. Gen. 197, 200, 201 (1929); *Citizenship of Foreign-born Minor Child*, 37 Op. Atty. Gen. 90, 92–94 (1933). During the debates on the Cable Act of 1922, 42 Stat. 1021, Congressman Johnson of Washington pointed out that "parent" in Section 5 of the 1907 Act refers to the "mother" only "in the event of the death of the father." 62 Cong. Rec. 9057. The 1907 Act, and its application to the instant case, are discussed, *infra*, pp. 37 *ff*.

174–175; 2 Kent, *Commentaries* (14th ed., 1896), pp. 52–53.[10] This view is understandable since it was not until the Act of May 24, 1934, 48 Stat. 797, that women achieved equality with men in citizenship matters for themselves and their children. See S. Rep. No. 865, 73d Cong., 2d Sess., and H. Rep. No. 131, 73d Cong., 1st Sess.; 2 Hyde, *International Law* (2d rev. ed., 1945), pp. 1075–1076. Although some authorities took the position that the first clause of R.S. 2172 required both parents to become citizens before the child could derive citizenship through them (Webster, *Law of Naturalization* (1895 ed.), p. 81; see *United States ex rel. Fracassi v. Karnuth*, 19 F. Supp. 581, 582 (W.D. N.Y.), that view did not really conflict with the other authorities which recognized that a minor child could derive citizenship through the naturalization of his father—at least during the period from 1855 to 1922, for during that period the citizenship of the husband, whether by naturalization or otherwise, conferred citizenship upon his wife under R.S. 1994. Seen fn. 8, *supra*, p. 27.

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[10] Since Section 2 of the Act of March 26, 1804, 2 Stat. 292, provided for the granting of United States citizenship to "the widow and the children" of an alien who had declared his intention of becoming a United States citizen, etc., but who had died prior to being "actually naturalized", Chancellor Kent noted that perhaps the first clause of the 1802 Act required only the "father" to be naturalized in order to confer citizenship upon the minor child. He pointed out that that "provision [Section 2 of the 1804 Act] shows that the naturalization of the *father* was to have the efficient force of conferring the right on his children." 2 Kent, *Commentaries* (14th ed., 1896), at pp. 52–53.

To summarize: Three constructions have been placed upon the term "children of persons" appearing in the first clause of R.S. 2172: (1) that "persons" applies to and includes both parents—mother and father; (2) that "persons" means the father only; (3) that "persons" means the mother, alone, only in those instances where there has been a termination of the marital relationship with the alien husband, with legal custody of the child in the mother, and the mother becomes naturalized during the minority of the child. As applied to the instant case, none of these readings will help the petitioner in construing "persons" in the second clause of R.S. 2172 to mean his mother alone, since his father was living and unnaturalized at the time of his birth in Italy and thereafter.[11]

Insofar as petitioner speaks (Br. 20) of "giv[ing] to men as a class greater political rights than to women as a class" his plea is obviously addressed to the wrong forum. It merely reiterates an old complaint concerning the inferior legal and political status of women, which persisted until very recent times. The common law upheld a concept of family

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[11] Petitioner's reliance upon *United States* v. *Sanders*, 27 Fed. Cas. No. 16,220 (C.C.D. Ark.) (1847), for the proposition that "in some circumstances citizenship descended through the mother as well as through the father" (Pet. Br. 9), is misplaced. The *citizenship* of the person there in question was not involved or discussed. The court merely pointed out that, for purposes of determining its jurisdiction under a United States statute, the character of the child—whether white or Indian—would be determined by the character of its mother, not the father. *Id.* at pp. 951–952. Moreover, that case was decided before the 1855 Act was passed.

unity in such matters as property, voting, and citizenship, with the husband the spokesman for the unit. This conception of family unity prevailed until the emancipation of women was fully achieved. This view of family unity, reflected in the citizenship statutes until 1934, was expounded in this Court's leading decision of *Mackenzie* v. *Hare,* 239 U.S. 299.

This explains why the early citizenship statutes and R.S. 2172 spoke of the children "of persons" and why the 1855 law and R.S. 1993 spoke of the children of "fathers". In the legislative climate of the statutory enactments of 1802, 1855, and 1874, it is inconceivable that Congress intended to confer citizenship status on a child born abroad to an American mother and an alien father. Whether such a dispensation comports with present day attitudes is not relevant. Congress chose not to grant citizenship at birth through the mother until 1934 and then made the grant prospective only (*supra,* pp. 3–4, fn. 5, p. 22, *infra,* pp. 49 *ff.*). When petitioner was born outside the United States, citizenship could come only through the father and, since his father was an alien, petitioner was an alien.

2. *The second clause of R.S. 2172 was not prospective in application.*

To succeed in his claim under R.S. 2172 petitioner must establish not only that "persons", as used in the second clause of the section, can mean "mother", but also that the second clause is prospective in application and, hence, operates to confer benefits upon him. However, this contention (Pet. Br. 10–18) runs counter not only to the interpretation placed upon the sec-

ond clause of R.S. 2172 by the authorities, but also to the language, purpose, legislative history, and application of R.S. 1993, the companion provision which was first enacted in 1855.

As discussed above in connection with the background of the statutes (*supra*, pp. 16–21), it is clear that when Congress passed the Act of 1855 (subsequently R.S. 1993), it believed that the second clause of the Act of 1802 (subsequently R.S. 2172) was not prospective in operation. This interpretation was deemed required by the language of the second clause of the 1802 Act, "children of persons who *now are*, or *have been*, citizens of the United States."[12] The 1855 enactment was retrospective as well as prospective, reading in part, "[t]hat persons *heretofore born or hereafter to be born*, out of the limits and jurisdiction of the United States * * *" (emphasis added). See 10 Stat. 604. It thus served to rectify a recognized past defect in the second clause of the 1802 Act.[13] The 1855 Act did not affect derivative rights of citizenship through the naturalization of the parents of minor children, as provided for in the first

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[12] Since this language is not in the first clause of R.S. 2172, that clause was construed to operate prospectively. *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135; *Zartarian* v. *Billings*, 204 U.S. 170.

[13] This Court pointed out in *United States* v. *Wong Kim Ark*, *supra*, 169 U.S. at 674, that "[i]t thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802." See also *Weedin* v. *Chin Bow*, 274 U.S. 657, 663–664.

clause of the 1802 Act; it dealt only with remedying the defect in the second clause of the 1802 Act, with respect to the citizenship of children born abroad whose parents (or fathers) were citizens at the time of their birth. This was the law after 1855.

Moreover, the 1855 Act made crystal clear that citizenship was to come through the father alone. In fact, Congressman Cutting who proposed the 1855 legislation, specifically pointed out this limiting feature during debate (32 Cong. Globe 170, 33d Cong., 1st Sess.):

> In the reign of Victoria, in the year 1844, the English parliament provided that the children of English mothers, though married to foreigners, should have the rights and privileges of English subjects, though born out of allegiance. *I have not, in this bill, gone to that extent, as the House will have observed from the reading of it.* [Emphasis added.]

Throughout the legislative history of the naturalization and citizenship legislation subsequent to the 1874 re-enactments of the 1802 and 1855 Acts, Congress took it for granted that the second clause of R.S. 2172 was not prospective, by expressly pointing out that the citizenship status of foreign-born children was determined by the citizenship of their fathers, *i.e.*, that R.S. 1993 was the exclusive statute which applied to the situation of those foreign-born children. In the House Report which accompanied the Cable Act of 1922 (42 Stat. 1021–1022), the following observation was made by the committee (H. Rep. No. 1110, 67th Cong., 2d Sess., at p. 3):

> This bill in no wise affects the status of children. Those born here are citizens of the United States, under the Constitution, regardless of the allegiance of their parents. Those born abroad will, *as heretofore, take the nationality of their fathers.* [Emphasis added.]

See, also, 62 Cong. Rec. 9059; H. Doc. No. 326, 59th Cong., 2d Sess., at p. 77. And in both the House and Senate Committee reports which accompanied the Act of May 24, 1934 (48 Stat. 797), the reports specifically pointed out (H. Rep. No. 131, 73d Cong., 1st Sess., and S. Rep. No. 865, 73d Cong., 2d Sess., at pp. 2 and 1, respectively):

> By the present law citizenship by birth outside the United States is derived *only through the American father.* [Emphasis added.]

The Committee report declared that the purpose of the amendment was "to establish complete equality between American men and women in the matter of citizenship for themselves and for their children".

Thus, the view of Congress, from the remedial legislation in 1855 down to 1934, was that the second clause of the 1802 Act, as re-enacted in R.S. 2172, was not prospective, but that the citizenship of foreign-born children of persons born after 1874 (at the least) turned upon the citizenship of their fathers at the time of their birth.

This Court as well as other courts and authorities have expressly taken the position that the second clause of the 1802 Act (as re-enacted in R.S. 2172) was not prospective in operation. *United States* v.

Wong Kim Ark, 169 U.S. 649, 673; *Weedin* v. *Chin Bow*, 274 U.S. 657, 663–664; *Ying* v. *Cahill*, 81 F. 2d 940, 941 (C.A. 9); *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177, 179 (D. D.C.); *D'Alessio* v. *Lehman*, 183 F. Supp. 345, 346–347 (N.D. Ohio); 2 Kent, *Commentaries* (14th ed., 1896), p. 53. In *United States* v. *Wong Kim Ark*, *supra*, the Court pointed out (169 U.S. at 673):

> But the provision concerning foreign-born children [the second clause of R.S. 2172], being expressly limited to the children of persons who then were or had been citizens, clearly did not include foreign-born children of any person who became a citizen since its enactment. * * * Mr. Binney's paper, as he states in his preface, was printed by him in the hope that Congress might supply this defect in our law.[14]

Finally, it is obvious that if petitioner's construction of R.S. 2172 were adopted there would be a direct conflict between R.S. 2172 and R.S. 1993, since the foreign-born children of "persons" (including *mothers*) who were citizens while R.S. 2172 was still on the books would be citizens under R.S. 2172, while R.S. 1993 confers citizenship only upon those foreign-born children whose *fathers* were citizens at the time of their birth, the father having resided in the United States prior to the child's birth. Petitioner's proposed construction that "persons" in R.S. 2172 could mean "mother" alone would thus conflict with R.S. 1993, making the "fathers" the focal point of citizenship.

[14] This Court's opinion in *Weedin* v. *Chin Bow*, *supra*, devotes considerable space to Mr. Binney's article and the need for the 1855 Act.

The duty of the courts is to "reject any construction which would make one section inconsistent with another relating to the same general subject." *United States* v. *Kellar*, 13 Fed. 82, 83–84 (S.D. Ill.). Moreover, petitioner's view would mean that citizenship could be transmitted by a mother who had never resided in the United States prior to the birth of the child abroad, since no prerequisite of prior residence appears in R.S. 2172. Such a consequence would be contrary to the explicit requirement of prior residence which appears in R.S. 1993 and in every other enactment that has dealt with this subject since the birth of the Republic. See *Weedin* v. *Chin Bow, supra*.[15]

II. PETITIONER DID NOT BECOME A CITIZEN UNDER SECTION 5 OF THE ACT OF MARCH 2, 1907.

Sections 3 and 5 of the Act of March 2, 1907, 34 Stat. 1228–1229, provided:

> SEC. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

[15] Petitioner's argument (Br. 19–20) that the requirement of prior residence in the United States by the father can be satisfied by residence of an alien father is fallacious. It is abundantly clear that this prerequisite was added in order to limit the capacity to transmit citizenship to *citizen* fathers who had previously resided in the United States. See *Weedin* v. *Chin Bow*, 274 U.S. 657.

> SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

Petitioner's mother, a native citizen, and his father, an Italian national, were married in the United States in 1905—prior to the adoption of the 1907 Act. Petitioner contends (Pet. Br. 22–23) that his mother's citizenship was "in abeyance" during her visit to Italy in 1906, and that, "upon her resumption of residence" in the United States in 1906, the "petitioner became a citizen under the provisions of Section [5] of the Act of March 2, 1907." The court of appeals, however, correctly held that petitioner's mother did not lose her United States citizenship on her marriage to an alien prior to the adoption of the 1907 Act, and that, therefore, "there could be no later resumption of citizenship by which plaintiff could claim a derivative naturalization" (R. 55). Moreover, even if it be assumed for the sake of argument that petitioner's mother lost her citizenship on her marriage to an alien, the 1907 Act (assuming its applicability to events which had all occurred before its enactment) required that, in order for the wife to "resume" her United States citizenship, and hence confer citizenship upon her minor child at the time of

such resumption, there would have to be a termination of the marital relationship with the alien husband. The Act did not confer derivative citizenship upon a minor child whose mother merely resumed her "residence" in the United States.

A. PETITIONER'S MOTHER COULD NOT "RESUME" HER UNITED STATES CITIZENSHIP IN 1906 BECAUSE SHE DID NOT LOSE HER CITIZENSHIP ON HER MARRIAGE TO AN ALIEN IN 1905, OR THEREAFTER

1. In *Shanks* v. *Dupont*, 3 Pet. 242 (1830), this Court held that a citizen woman did not lose her United States citizenship on her marriage to an alien. The Court said (3 Pet. at 246):

> * * * [M]arriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance, and become aliens. If it were otherwise, then a *feme* alien would, by her marriage, become, *ipso facto*, a citizen, and would be dowable of the estate of her husband; which is clearly contrary to law. * * *

See also, 2 Kent, *Commentaries* (14th ed., 1896), p. 49. However, the rationale of the *Shanks* case was weakened when Congress in 1855 and 1868 enacted statutes which provided that (1) an alien wife became a citizen of the United States on her marriage to a citizen husband, and that (2) since the "right of expatriation is a natural and inherent right of all peo-

ple * * *, any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." See Section 2 of the Act of February 10, 1855, 10 Stat. 604; Preamble and Section 1 of the Act of July 27, 1868, 15 Stat. 223, 224, re-enacted in 1874 as R.S. 1999; *Mackenzie* v. *Hare*, 239 U.S. 299, 309; *Savorgnon* v. *United States*, 338 U.S. 491, 497–8; *In re Wohlgemuth*, 35 F. 2d 1007, 1008 (W.D. Mich.); *Pequignot* v. *City of Detroit*, 16 Fed. 211, 213–214 (E.D. Mich.).

With respect to the period between this legislation and the passage of the Expatriation Act of 1907, there have been three views on the question of whether a woman lost her citizenship on her marriage to an alien. Relying largely on the fact that there was no statute expressly "denationalizing" women who married aliens, some have held that a woman did not lose her United States citizenship in such circumstances, even though she left the United States and took up domicile with her husband abroad. *E.g.*, *Petition of Zogbaum*, 32 F. 2d 911, 912–913 (D. S. Dak.); see *Citizenship*, 15 Op. Atty. Gen. 599, 601 (1877); *Case of Mrs. Preto and Daughter*, 10 Op. Atty. Gen. 321, 322–323 (1862). Others have held that marriage to a foreigner, even without a change of domicile to another country, resulted in a loss of the woman's United States citizenship. *In re Page*, 12 F. 2d 135 (S.D. Cal.); *In re Krausmann*, 28 F. 2d 1004 (E.D. Mich.); *In re Wohlgemuth*, 35 F. 2d 1007, 1008 (W.D. Mich.); *Pequignot* v. *City of Detroit*, 16 Fed. 211, 217

(E.D. Mich.); *see Jennes* v. *Landes,* 84 Fed. 73, 75 (D. Wash.). In the eyes of some of these courts, the 1907 Act—providing for an immediate forfeiture of citizenship on marriage to an alien husband—was merely "declaratory" of the common law then existing.[16]

A third group of authorities, which constitutes the weight of authority, holds that marriage alone to an alien did not work a loss of citizenship, but that if a change of domicile to another country accompanied the marriage there would be a forfeiture of citizenship on the part of the woman. *Ruckgaber* v. *Moore,* 104 Fed. 947, 948–949 (E.D. N.Y.), affirmed, 114 Fed. 1020 (C.A. 2); *In re Fitzroy,* 4 F. 2d 541, 542 (D. Mass.); *Watkins* v. *Morgenthau,* 56 F. Supp. 529, 530–531 (E.D. Pa.); *Wallenburg* v. *Mo. Pac. Ry. Co.,* 159 Fed. 217, 219 (C.C. D. Neb.); *Comitis* v. *Parkerson,* 56 Fed. 556, 559–560 (E.D. La.), writ of error dismissed *sub nom. Comitiz v. Parkerson,* 163 U.S. 681; *In re Lynch,* 31 F. 2d 762 (S.D. Cal.); *In re Wright,* 19 F. Supp. 224, 225 (E.D. Pa.); see *Citizenship,* 13 Op. Atty. Gen. 128, 129–130 (1869); *Case of*

[16] Congressman Perkins pointed out, during debate on the 1907 Act, that the bill was "in large part" declaratory of "the law as it now is.* * * [because] a woman who marries a foreigner takes the citizenship of her husband." See 41 Cong. Rec. 1464, 1465. This observation, however, is incomplete, for up to 1907, statutory provision was made only for an alien woman to take the citizenship of her United States citizen husband. See R.S. 1994. As we have noted, there was a split of opinion whether a citizen woman *lost* her citizenship on marriage to an alien. Thus, the 1907 Act could not be declaratory of "the law as it now is." At most, it was only declaratory of those few cases which held that a citizen woman lost her citizenship on her marriage, without more, to an alien.

Madame Berthemy, 12 Op. Atty. Gen. 7, 9 (1866); see also *Petition of Drysdale*, 20 F. 2d 957, 958 (E.D. Mich.). The cases in this third group, apart from embodying the decided weight of authority with respect to the period prior to the 1907 Act, have the added support that the requirement of a change of domicile outside the United States, accompanied by marriage to a foreigner, discloses a more deliberate and unequivocal expression of intention to expatriate oneself than does marriage, without more. *In re Wright, supra*, 19 F. Supp. at 225; *Ruckgaber* v. *Moore, supra*, 104 Fed. 947, 948–949, affirmed, 114 Fed. 1020 (C.A. 2); *Comitis* v. *Parkerson, supra*, 56 Fed. at 562–563.[17] And perhaps more significantly, this Court suggested in *Mackenzie* v. *Hare*, 239 U.S. 299, that it would not recognize that mere marriage to a foreigner prior to the 1907 Act resulted in a loss of the wife's citizenship; the focal point of the decision in *Mackenzie* was that the woman in question, who married an alien subsequent to the 1907 Act, voluntarily entered into a marital relationship "*with notice of the consequences*" (emphasis added). *Id.* at 312. See 2 Hyde, *International Law* (2d rev. ed., 1945), p. 1115, fn. 3. Since there was no legislation on this subject in 1905, when petitioner's mother married an alien, there was no legislative notice of a loss of citizenship as a consequence of her marriage.

2. Under either the first or the third view of the status of American women who married foreigners

[17] The court in *In re Lynch*, *supra*, 31 F. 2d 762, pointed out that with such a change of domicile abroad "the wife adopts the nationality of her husband."

before the 1907 Act—together constituting the very great weight of authority, and the preferable position—petitioner's mother did not lose her citizenship on the marriage to petitioner's father in the United States in 1905. There was, of course, no change of domicile when petitioner's family traveled to Italy in 1906, the trip being for a visit only. Hence, petitioner's mother never had occasion to "resume" citizenship under the 1907 Act or otherwise.

Section 3 of the 1907 Act, *supra*, p. 3, deprived "any American woman"—whether she was native-born or naturalized—of her citizenship on her marriage, without more, to an alien, and provided that, on the termination of the marital relationship, the woman could "resume" her United States citizenship on fulfilling certain requirements.[18] And in Section 5

[18] Sections 6 and 7 of the Cable Act of 1922, 42 Stat. 1021–1022, expressly repealed Sections 3 and 4 of the 1907 Act, as well as R.S. 1994. Section 3 of the Cable Act provided, *inter alia*, that an American woman did not lose her citizenship on marriage to a foreigner unless she renounced her United States citizenship before a court having jurisdiction over the naturalization of aliens, or unless she married a foreigner who was, himself, ineligible to citizenship. Section 4 of the Cable Act provided for a short form of naturalization for those American women who had lost their citizenship on marriage to a foreigner who was eligible to citizenship. By 1931, the last remnants of the effect of marriage on loss of citizenship were eliminated. See Act of March 3, 1931, 46 Stat. 1511–1512; Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. of Pa. L. Rev. (1950) 25, 47–49.

By the Act of May 24, 1934, 48 Stat. 797, R.S. 1993 was amended to provide for United States citizenship of those foreign-born children whose mothers or fathers were citizens at the time of the birth of such children. The Act was solely prospective in operation and was enacted "to complete the provisions of the Cable Act of 1922 so as to establish complete

of the Act, a foreign-born minor child of such a marriage could derive citizenship on the naturalization or "resumption of American citizenship" by the parent, provided such naturalization or "resumption of American citizenship" took place during the child's minority.

Plainly, petitioner can derive no benefit from Section 5. Neither parent was naturalized during his minority, and his mother never "resumed" her United States citizenship because, as indicated *supra*, pp. 39–43, she never lost that citizenship. By Section 3, Congress provided, on the termination of the marriage, for the resumption of citizenship which was lost as a result of that marriage; but where citizenship was not lost, as here, there was no citizenship to resume under the 1907 Act. H. Rep. No. 6431, 59th Cong., 2d Sess., pp. 1–2; 41 Cong. Rec. 1464, 1465; *Petition of Black*, 64 F. Supp. 518, 520 (D. Minn.).

Moreover, the operative events in petitioner's case—his mother's marriage to an alien, his birth abroad, his mother's return with him to this country—had all

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Footnote 18 continued from p. 43.
equality between American men and women in the matter of citizenship for themselves and their children." S. Rep. No. 865, 73d Cong., 2d Sess., and H. Rep. No. 131, 73d Cong., 1st Sess., at pp. 1 and 2, respectively. The 1934 Act followed the acceptance by this country of the convention on the Nationality of Women which was concluded at the Seventh International Conference of American States, December 26, 1933, in which Article 1 pointed out that "there shall be no distinction based on sex as regards nationality, in their legislation or in their practice." See 2 Hyde, *International Law* (2d rev. ed., 1945), at p. 1075; also, *supra*, pp. 3–4, and *infra*, pp. 49 *ff*.

occurred in 1905 and 1906, prior to the adoption of the 1907 Act. By the time that statute came onto the books, petitioner and his mother were back in this country living together with his father.

B. PETITIONER CANNOT DERIVE CITIZENSHIP FROM SECTION 5 OF THE 1907 ACT SINCE THERE WAS NO TERMINATION OF HIS MOTHER'S MARITAL RELATIONSHIP

Section 3 of the 1907 Act, *supra*, p. 3, expressly provided that a woman who lost her citizenship on marriage to a foreigner could not "resume" her United States citizenship until there had been a termination of the marital relationship. 34 Stat. 1228–1229. Since the marriage to an alien constituted an impediment to the continued existence of American citizenship on the part of the woman, it was logical for Congress to allow the woman to resume her United States citizenship when that impediment was removed by the ending of the marriage. In the debates which preceded the enactment of the 1907 legislation, Congressman Perkins, who sponsored the bill, pointed out that "where the marital relation has terminated—*which may either be by the death of her husband or by absolute divorce*—the woman shall have the right, either by returning to this country or by filing a declaration before proper officers, to retake her citizenship in the United States" (emphasis added). 41 Cong. Rec. 1464, 1465. The House Committee Report which accompanied the bill indicated that the wife could resume her citizenship "upon the termination of the marital relation." H. Rep. No. 6431, 59th

Cong., 2d Sess., pp. 1–2. See, also, 2 Hyde, *International Law* (2d rev. ed., 1945), at pp. 1116, 1119.

The mere fact (if it be a fact) that petitioner's mother and father, following family difficulties, lived apart for about six months after the petitioner was born, and that petitioner returned to the United States with his mother alone in 1906, did not bring about a "termination" of the marital relationship within the contemplation of the statute.[19] Even under the testimony of petitioner's mother, it is clear that the mother and father soon became reconciled, and they have lived together in the marital relationship down to the present time. There was thus no termination of the marital relationship by death of the husband, or divorce, or even by mutual separation with absolute custody of the child in the wife (see *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177, 180–181 (D. D.C.). Therefore, even if it be assumed *arguendo* that petitioner's mother lost her citizenship on her marriage to an alien and it is also assumed that the 1907 Act could apply at all to petitioner, petitioner could not derive citizenship benefits under Section 5 of that Act because his mother could not resume her citizenship under that provision, the marital relation not having ended.

In any event, petitioner's mother and father were reconciled by the time the 1907 Act was passed, and the marital relationship has continued down to the present time. Since the 1907 Act certainly did not

[19] When petitioner was brought to the United States as an infant, he was declared as destined to his father (R. 37).

apply to family situations which no longer existed by the time of its adoption (see 41 Cong. Rec. 1466),[20] the marital difficulty of petitioner's parents before the passage of the Act is wholly immaterial for present purposes.

C. RESUMPTION OF RESIDENCE BY THE MOTHER WAS NOT A RESUMPTION OF CITIZENSHIP

Section 3 of the 1907 Act, *supra*, p. 3, allows the woman to resume her lost United States citizenship, and Section 5, *supra*, p. 3, confers citizenship upon a minor child whose "parent" becomes naturalized or resumes United States *citizenship*. The statute does not grant citizenship to a minor child whose parent merely resumes a *residence* in the United States. The Act speaks of a resumption of citizenship—not of residence.

Petitioner's complaint (Pet. Br. 23)—that if he is not allowed to benefit under the provisions of Section 5, then "a naturalized or an expatriated mother who resumed citizenship [is], by law, endowed with greater political right and with power to pass greater rights than a native-born mother who never lost her citizenship"—misses the point of the 1907 legislation. The 1907 Act took away the citizenship of all American women—whether native-born or naturalized citizens—on their marriage to aliens. Since marriage to an alien was, in legal effect, an impediment to continued

[20] When Congressman Perkins was asked whether Section 3 of the Act was retrospective, he replied "that no laws are presumed to be retrospective in the absence of express provision in the bill." 41 Cong. Rec. 1467.

United States citizenship, Congress made provision for a "resumption" of citizenship on the termination of the impediment, by compliance with certain requirements. That Section 5 of the 1907 Act granted citizenship to those foreign-born children whose expatriated mother resumed United States citizenship during the minority of the child (after termination of the marital relationship) did not confer greater political rights upon that mother as compared to a native mother who married an alien prior to 1907. An American woman, like petitioner's mother, who married an alien prior to the 1907 legislation, had greater political rights than her counterpart who married an alien when the 1907 Act was in effect, in the sense that she *retained* her citizenship while the counterpart *lost* hers. The 1907 Act sought to redress the balance by making special provision for the children of the denationalized woman once her alien marriage had ended.

Section 5 of the 1907 Act deals only with citizenship *acquired after birth through a parent's change of nationality,* and not with citizenship *at and by birth.* Petitioner's argument confuses these two separate concepts, and erroneously assumes that he can somehow fit within the statute although neither of his parents changed nationality after petitioner was born. As we have shown, his mother did not lose her American nationality and likewise did not reacquire it under the 1907 Act (or otherwise); his father has remained an Italian national to this day. Thus, there is no occasion for any rule of citizenship

by acquisition—the sole concern of Section 5 of the 1907 Act—to come into play.[21]

III. PETITIONER DID NOT BECOME A CITIZEN UNDER SECTION 2 OF THE ACT OF MAY 24, 1934

Section 2 of the Act of May 24, 1934, 48 Stat. 797, amended Section 5 of the Act of March 2, 1907, 34 Stat. 1228–1229, *supra*, to read as follows:

> SEC. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the natural-

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[21] When petitioner came to the United States in 1906 he was a child in the arms of his mother. He was admitted with his mother as a citizen, destined to his father in this country (R. 27–28, 37). However, since his admission as a citizen was in no sense a formal adjudication or considered determination of citizenship—as was the case in *Delmore* v. *Brownell*, 236 F. 2d 598, 600 (C.A. 3); *Lee Hon Lung* v. *Dulles*, 261 F. 2d 719, 723–724 (C.A. 9)—but merely an *ad hoc* ruling at the port, there was no requirement that the government rebut petitioner's claim of citizenship with clear and convincing evidence. And as the court below correctly pointed out (R. 55–56), "Finally, even if the action of Immigration officials * * * was sufficient to establish a *prima facie* case of plaintiff's citizenship, it was rebutted convincingly by the showing that the Immigration officers committed legal error in designating plaintiff as a citizen at the time of his entry." The error of immigration officers in recording status at the time of entry can hardly (as petitioner's brief suggests, p. 16) be regarded as a controlling, consistent administrative construction.

In addition, we point out that petitioner did not need a passport, visa, or other document when he came to the United States. See Gordon and Rosenfield, *Immigration Law and Procedure* (1959 ed.) 115, 206, 664, 667. His 1906 entry was unquestionably lawful. The deportation order in his case was not predicated upon any supposed illegal entry but upon petitioner's conviction in the United States for two crimes involving moral turpitude.

> ization of or resumption of American citizenship by the father or the mother; *Provided,* That such naturalization or resumption shall take place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States.

Thus, derivative citizenship through the naturalization or resumption of citizenship by the "parent" during the minority of the child, as provided in the 1907 Act, was amended to establish such derivative citizenship through the naturalization or resumption of citizenship by the "mother or the father." Petitioner contends (Pet. Br. 24–27) that, "by virtue of his mother's nationality and resumption of residence," he became a citizen five years after his entry into the United States "by the clear operation of the Act of May 24, 1934."

A. The same reasons which deny petitioner relief under Section 5 of the Act of March 2, 1907 (see *supra,* pp. 37–49), operate to deny him relief under Section 2 of the 1934 Act, for Section 2 was adopted only for purposes of "clarif[ying] the present uncertainties of the law [Section 5 of the 1907 Act]." S. Rep. No. 865, 73d Cong., 2d Sess., at p. 1; H. Rep. No. 131, 73d Cong., 1st Sess., at p. 2.[22] See also

[22] Section 2 of the 1934 Act amended the 1907 Act to provide that a minor child could not derive citizenship through the naturalization or resumption of citizenship of his father or mother until the child resided permanently in the United States for at least five years. The 1907 Act conferred citizenship "at

United States ex rel. Guest v. *Perkins*, 17 F. Supp. 177, 180 (D. D.C.); *Kletter* v. *Dulles*, 111 F. Supp. 593, 596, 597 (D. D.C.), affirmed, *sub nom. Kletter* v. *Herter*, 268 F. 2d 582 (C.A. D.C.), certiorari denied, 361 U.S. 936.[23] Petitioner cannot derive citi-

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Footnote 22 continued from p. 50.
the time such minor child [began] to reside permanently in the United States." 34 Stat. 1229.

The Senate and House Committee reports used identical language in pointing out that "Section 2 clarifies the present uncertainties of the law so that naturalization of an alien mother will confer United States citizenship upon her minor children born abroad who are admitted for permanent residence in the United States during their minority. The present law appears to confer United States citizenship upon such children but the uncertainty in the law makes necessary the clarifying language of the present bill." S. Rep. No. 865, 73d Cong., 2d Sess., and H. Rep. No. 131, 73d Cong., 1st Sess., at pp. 1 and 2, respectively.

[23] Several authorities expressly pointed out that, so long as the marital relation continued with an alien husband, naturalization of the "parent" did not mean the naturalization of the mother alone, for the purposes of Section 5 of the 1907 Act, and the naturalization of the mother in such circumstances would not confer citizenship upon her minor children under that section. *In re Citizenship Status of Minor Children, etc.*, 25 F. 2d 210 (D.N.J.); Congressional debate on the Cable Act of 1922, 62 Cong. Rec. 9044; 3 Hackworth, *Digest of International Law* (1942), p. 77; *Citizenship of R. Bryan Owen*, 36, Op. Atty. Gen. 197, 200 (1929). See *Kletter* v. *Herter*, 268 F. 2d 582 (C.A. D.C.), certiorari denied, 361 U.S. 936. As indicated *supra*, pp. 26–32, 45–47 and *infra*, pp. 52–55, it was generally recognized that where the marital relationship had ended through death of the husband (father) or through divorce, the acquisition of citizenship by the mother, who had custody over the minor child, operated to confer citizenship upon the minor child under R.S. 2172 or Section 5 of the 1907 Act. See, *e.g.*, *In re Lazarus*, 24 F. 2d 243, 244 (N.D. Ga.); *Petition of Drysdale*, 20 F. 2d 957, 958 (E.D. Mich.); *Roa* v. *Collector of Customs*, 23 Philippine Rep 315, 341; *Citizenship of R. Bryan Owen*, 36 Op. Atty. Gen. 197, 200 (1929); Van Dyne, *Citizenship of the United States* (1904 ed.), p. 118; Cockburn, *Nationality* (1869 ed.), p. 213.

zenship under Section 5 of the 1907 Act or Section 2 of the 1934 Act for the reasons we have already suggested: (1) His father never became a naturalized American citizen. (2) His mother never lost her citizenship and, hence, had no United States citizenship to "resume" under Section 3 of the 1907 Act or Section 2 of the 1934 Act. (3) If his mother had lost her citizenship on her marriage to an alien in 1905, there could be no resumption of her United States citizenship until there had been a "termination" of the marital relation, a fact not present in this case. (4) The 1907 and 1934 Acts do not confer citizenship upon a minor child whose mother "resumes" her *residence* in the United States, nor do they allow a woman to resume her citizenship merely upon such a resumption of residence; citizenship could come through the mother only if, having lost her citizenship through marriage to a foreigner, she "resumed" such citizenship on a "termination" of the marital relation.

B. In support of his claim of citizenship under Section 2 of the 1934 Act, petitioner relies upon a number of authorities: *Petition of Black,* 64 F. Supp. 518 (D. Minn.); *Petition of Drysdale,* 20 F. 2d 957 (E.D. Mich.); *United States ex rel. Guest* v. *Perkins,* 17 F. Supp. 177 (D. D.C.); *United States* v. *Kellar,* 13 Fed. 82 (S.D. Ill.); *Citizenship of Foreign-born Minor Child* 37 Op Atty. Gen. 90 (1933); and *Citizenship of R. Bryan Owen,* 36 Op. Atty. Gen. 197 (1929). These cases are, however, all distinguishable for the simple reason that the marital relationship of the parents had been terminated by death of the husband (father), divorce of the parties, or separation by mutual consent.

In *Petition of Black*, 64 F. Supp. 518 (D. Minn.), the court pointed out that, although the mother had not lost her United States citizenship on her marriage to a foreigner in 1929, the mother should, after returning to the United States and securing a divorce, be treated as though she had "resumed" her United States citizenship, so as to confer citizenship benefits upon her minor child. The court said (64 F. Supp. at 520):

> While Mrs. Black could not become naturalized in judicial proceedings and thereby bestow citizenship rights upon her alien child because she had never lost her American citizenship, she could, however, to all practical purposes, *resume her American citizenship by returning permanently to the United States and terminating the marriage relationship with her alien husband.* [Emphasis added.]

In like vein, in *Citizenship of Foreign-born Minor Child*, 37 Op. Atty. Gen. 90 (1933), the citizen mother did not lose citizenship on marrying a foreigner in 1923, but, after returning for permanent residence in the United States, the mother obtained an absolute divorce in Nevada from her husband and was awarded the custody of the minor child. Attorney General Mitchell pointed out that, insofar as the citizenship of the minor child was concerned, the mother should be treated as though she has resumed her United States citizenship lost on her marriage to a foreigner. *Id.* at 92, 94. But, again, there could have been no resumption of citizenship under Section 3 of the 1907 Act unless there had been a termination of the marital rela-

tion. Similarly, in *Petition of Drysdale*, 20 F. 2d 957 (E.D. Mich.) and *United States ex rel. Guest* v. *Perkins*, 17 F. Supp. 177 (D. D.C.), each of the mothers had lost her United States citizenship on marriage to a foreigner, but on returning to reside in the United States and on termination of the marital relation (by death of the husband in *Drysdale*; by mutual consent with custody of the child in the mother in *Guest*), the courts held that the children derived citizenship through the resumption of citizenship by the mothers while the children were minors.[24] In *United States* v. *Kellar*, 13 Fed. 82 (S.D. Ill.) and *Citizenship of R. Bryan Owen*, 36 Op. Atty. Gen. 197 (1929), the rule was reiterated that, where the father of the child is *dead* and the mother subsequently becomes a United States citizen (through naturalization proceedings, as in *Owen*; or through the operation of R.S. 1994 on her remarriage to a United States citizen between 1855 and 1922, as in *Kellar*), the child obtains derivative citizenship through R.S. 2172 or through Section 5 of the 1907 Act. But as we have already indicated, *supra*, pp. 26–31, 45–47, 49–52, this does not aid the petitioner whose alien father is still alive and whose parents' marital relation continued through petition-

[24] In *Drysdale*, the mother "resumed" her citizenship in 1901 when her husband (the father of the child) died. The child was then 17 years of age. The court pointed out that the mother could resume her citizenship since Section 3 of the 1907 Act, which provided for such resumption of citizenship, was "merely declaratory of the common law previously prevailing," and that, under the weight of authority, the foreign child took the citizenship of his mother on the death of his father. *Petition of Drysdale*, *supra*, 20 F. 2d at 958.

er's majority and until the present time.[25] The cardinal fact is that neither of petitioner's parents acquired or resumed American citizenship after he was born.

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[25] In *Kletter* v. *Dulles*, 111 F. Supp. 593 (D. D.C.), affirmed *sub nom. Kletter* v. *Herter*, 268 F. 2d 582 (C.A. D.C.), certiorari denied, 361 U.S. 936, which petitioner also cites (Pet. Br. 26), the child was born in Palestine of alien parents. In 1921, the plaintiff (the child) and his mother emigrated to the United States. In 1928, while the plaintiff was 17 years old, his mother became a naturalized United States citizen. The child subsequently returned to Palestine, and in 1935, he became a naturalized Palestinian. The court held petitioner's contention—that he became an American citizen through the naturalization of his mother even though his alien father was alive and there was no arrangement for his mother to have custody over him—to be "not without some doubt." *Id.* at. 597. This statement was prompted by the court's recognition of the fact that, on the one hand, Section 2 of the 1934 Act was enacted only to clarify the word "parent" in Section 5 of the 1907 Act to mean either "father or mother," thus adding color to plaintiff's claim of citizenship through the naturalization of his mother alone, while, on the other hand, there were administrative and judicial interpretations of the word "parent" to mean "father" alone, which would negate the plaintiff's claim. *Id.* at 597, 598. The court then went on to hold that, assuming plaintiff's construction of Section 5 of the 1907 Act to be correct (that he could derive citizenship through the naturalization of his mother alone), that derivative United States citizenship operated to destroy his Palestinian citizenship which he had acquired at birth, and that his subsequent Palestinian naturalization in 1935 was not only valid, but operated to expatriate the plaintiff under United States law. *Id.* at 598.

The *Kletter* case has no application to the instant one for the reason that neither of the petitioner's parents were naturalized, and neither of petitioner's parents resumed United States citizenship within the 1907 or 1934 Acts, so as to permit petitioner to claim a derivative citizenship through Section 5 of the 1907 Act. See *supra*, pp. 39–55.

IV. THE ALLEGED DENIAL BY A UNITED STATES CONSULAR OFFICER IN NAPLES, ITALY, OF A PASSPORT TO PETITIONER'S MOTHER FOR THE PURPOSE OF RETURNING TO THE UNITED STATES IN 1906 DOES NOT PRECLUDE THE GOVERNMENT FROM CONTESTING PETITIONER'S CLAIM OF UNITED STATES CITIZENSHIP

In the district court, petitioner's mother, Mrs. Maddelena Montana, testified that, after spending about a month and a half in Italy in early 1906, she desired to return to the United States. According to Mrs. Montana, she went to a "little town" (R. 22), accompanied by her parents, to obtain passports. The official on duty referred her to the United States consul in Naples. When she subsequently applied for a passport at the United States Consulate in Naples, the consul, according to her, "just took one look at me and he says, 'I am sorry, Mrs., you cannot in that condition.' 'You come back after you get your baby.'" (R. 23). Petitioner contends (Pet. Br. 28–30) that he "should be considered in being from the time of conception," that the alleged conduct of the United States consul in denying his mother a passport "encroached" upon his rights, and that the United States cannot take advantage of the misconduct of one of its officers "to deprive the petitioner of American nationality." In essence, petitioner is claiming that the alleged misconduct of the consul prevented him from being born in the United States, thus precluding natural-born citizenship status under the Fourteenth Amendment.

Regardless of what might be said with respect to estopping or preventing the government from relying upon the action or misconduct of officials to deprive

a person of his citizenship or incidents thereto (see *Lee You Fee* v. *Dulles*, 236 F. 2d 885 (C.A. 7), reversed on confession of error on other grounds, 355 U.S. 61; *Podea* v. *Acheson*, 179 F. 2d 306 (C.A. 2); *Dos Reis ex rel. Camara* v. *Nicolls*, 161 F. 2d 860 (C.A. 1)), it still must remain true that, in order successfully to advance "estoppel" or an allied theory, the claimant must show some initial misconduct on the part of governmental officials which is believed by the trier of fact. In the instant case, however, the trial judge, as fact finder, does not appear to have credited the claim that Mrs. Montana was denied the passport in question. He understood that petitioner was claiming estoppel, at least in part, but nevertheless dismissed the action at the conclusion of the case (R. 35, 39–40, 47). It is, of course, elementary that the fact-finding body, particularly in citizenship and allied cases, "need not accept uncontradicted testimony when good reasons appear for rejecting it, such as the interest of the witness, and improbabilities and important discrepancies in the testimony." *Yip Mie Jork* v. *Dulles*, 237 F. 2d 383, 385 (C.A. 9); *Flynn ex rel. Yee Suey* v. *Ward*, 104 F. 2d 900, 902 (C.A. 1); *United States ex rel. Gong Sik Ho* v. *Corsi*, 62 F. 2d 785, 786 (C.A. 2); *Lau Ah Yew* v. *Dulles*, 257 F. 2d 744, 746 (C.A. 9); *Wong Moon Jee* v. *Dulles*, 248 F. 2d 951, 952 (C.A. 1); *Wong Gong Foy* v. *Brownell*, 238 F. 2d 1 (C.A. 9). Petitioner's mother, with five other living children, all of whom were born in Chicago (R. 34–35), certainly had an interest, and a major one, in the outcome of petitioner's suit for

declaratory relief. The trial judge could have discounted her testimony on this score alone. See *Wong Moon Jee* v. *Dulles*, 248 F. 2d 951, 952 (C.A. 1); *Lau Ah Yew* v. *Dulles*, 257 F. 2d 744, 746 (C.A. 9); *Yip Mie Jork* v. *Dulles*, 237 F. 2d 383, 385 (C.A. 9).

Moreover, the testimony of petitioner's mother (R. 22–24), especially when appraised in context, does not indicate that she was actually *denied* a passport but rather, at most, that the consul suggested to her that she wait until her child was born before traveling back to the United States. She testified that she and her parents went to a "little town" for passports; that passports were issued to her parents but that she was directed to go to the American Consulate for her passport because the local office did not have her name; that two or three days later she and her mother went to the American Consulate in Naples; that on arriving at the consulate a man in a "uniform" took her into the consulate and introduced her to a "young man" and said that "he was the American Consul"; that she told the consul that she wanted to return "to my place where I was born"—that she wanted "to go back to the United States"; that the consul took "one look" at her and said, "I am sorry Mrs., you cannot in that condition," that she should come back after she delivered her baby; and that she returned "to the little home town"—Acerra—and lived there with her mother until petitioner was born about four months later (R. 22–24). This testimony is quite consistent with the consul's having *suggested* to Mrs. Montana that she wait for her child to be born; "you cannot in that con-

dition" (the words she ascribes to the consul) could quite easily mean no more than, "you're not well enough to travel from here to the United States in that condition and should wait until after the birth".

It seems incredible that the consul would have *denied* a passport to Mrs. Montana since, in 1906, there was no requirement for a citizen, on entering or returning to this country, to obtain a passport. (Indeed, in 1906 there were no documentary requirements—passports or visas—for citizens or for aliens.) Throughout most of the history of the United States, particularly that period between the Civil War and World War I, there was no requirement that a citizen obtain a passport on leaving or entering the United States. *Kent* v. *Dulles*, 357 U.S. 116, 123–124; see 3 Hackworth, *Digest of International Law* (1942 ed.), pp. 437, 526.[26] There would thus be no occasion for petitioner's mother to apply for a passport, save possibly the one now advanced by petitioner (Pet. Br. 30) that Italian law might have affected "those persons who wished to leave Italy." But the record is

[26] In 1815, Congress made it illegal for a citizen to "cross the frontier" into enemy territory, to visit any enemy camp within the United States or to board any enemy vessel in waters of the United States "without a passport first obtained" from the Secretary of State or his designate. Act of February 4, 1815, 3 Stat. 195, 199–200. Similar measures were imposed by the State Department during the Civil War. See *Kent* v. *Dulles*, 357 U.S. 116, 123. The Act of May 22, 1918, 40 Stat. 559, made it unlawful for a citizen to enter or leave the United States without a passport during wartime where the President, by proclamation, imposed additional restrictions on travel. See also H. Rep. No. 485, 65th Cong., 2d Sess.

barren of any requirement of Italian law that a passport was necessary, or that petitioner's mother thought that she had to have a passport for her return to the United States, and petitioner's briefs do not show any such requirement of Italian law. In any event, this is no reason to believe that if Italy required a passport the consul would have denied one, especially since it was unnecessary under American law. Petitioner seeks to sidestep this argument by contending that "this is an unusual forum * * * [for the government] to raise the argument for the first time." But this argument was advanced in the court below and, we submit, is properly before this Court now. Indeed, it is the petitioner who is strenuously urging an argument which was greatly played down in the district court. Prior to introducing her proof, counsel for petitioner informed the court (R. 47):

> Your Honor understands that while we do claim estoppel, *we are proceeding on pure law in this case. We are not relying on simple estoppel.* We think it is a consideration, but it is our position and very, a very carefully considered position that this man was under the law a citizen of the United States at the time he was born. [Emphasis added.]

The unlikelihood of a *denial of a passport* by the consul is further emphasized by Mrs. Montana's testimony that her father was a citizen of the United States, and that her parents—father and mother—obtained their respective passports in a "little town", but that, since the people there could not find her name, "they said * * * [that she] had to go to the

American Consul" to get her "passport" (R. 22, 24). The father, however, could not have obtained his American passport in the "little town", since, at that time, only "diplomatic or consular officers of the United States * * * and no other person" could issue or verify passports in foreign countries. R.S. 4075. The office in the "little town" would not be a diplomatic or consular office because the people there sent petitioner's mother to the "American Consul" for her passport (R. 22). If, however, the "little town" was a diplomatic or consular office of the United States, the sending of petitioner's mother to the "American Consul" for her "passport" would be unnecessary since the initial office would be permitted to issue the passport under R.S. 4075.[27] In sum, insofar as the testimony of Mrs. Montana indicates that she was *denied* a *passport*, it can properly be discounted as fantastic and incredible, both factually and legally, under well settled evidentiary standards. E.g., *Lau Ah Yew* v. *Dulles, supra,* 257 F. 2d at 746; *Yip Mie Jork* v. *Dulles, supra,* 237 F. 2d at 385; *Wong Moon Jee* v. *Dulles, supra,* 248 F. 2d at 952; *United States ex rel. Gong Sik Ho* v. *Corsi, supra,* 62 F. 2d at 786; *Flynn ex rel. Yee Suey* v. *Ward, supra,* 104 F. 2d at 902.

Finally, even if the claim of passport denial were accepted, the conduct on the part of the American

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[27] Also, if the mother had a passport when she left the United States, there would be no occasion for her to obtain another one in Italy, since a passport, at that time, was valid for one year. 3 Moore, *International Law Digest* (1906), Section 523, p. 977.

consul would be insufficient, as a matter of law, to estop the government from contesting petitioner's claim to citizenship, or as the court below pointed out (R. 55) "to grant citizenship to plaintiff." First, there is no showing that Mrs. Montana, who presumably did not have a passport when she left the United States since that passport would have been valid for a year and it would have been unnecessary to secure one in Italy, thought that she had to have a passport in order to return to the United States. Even if the consul refused her a passport, she would not have been prevented from returning to the United States—either legally, since no passport was required at that time of a citizen seeking entry into the United States, or factually, because no showing was made that she believed that she needed one for her return to this country. Secondly, even if the consul had granted the passport, there would have been no assurance, of course, that petitioner would have been born in the United States. Petitioner's mother might not have left Italy at that time, or even if she did leave Italy, she might not have been in the United States when the petitioner was born. In short, "proper conduct" of the consul would not have assured that petitioner would be born in the United States. Thus, those authorities which preclude the government from relying upon improper conduct of government officials which *directly leads* to a certain course of conduct by an individual, causing his loss of citizenship rights (see *Lee You Fee* v. *Dulles, supra; Podea* v. *Acheson, supra; Dos Reis ex rel. Camara* v. *Nicolls, supra*), are inapposite, for here

the alleged misconduct cannot be said to have led directly to petitioner's birth in Italy.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be affirmed.

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IN THE

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OCTOBER TERM, 1960

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vs.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY FOR PETITIONER.

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REPLY FOR PETITIONER.

SUMMARY OF ARGUMENT.

It is the position of the petitioner that under Section 2172 of the Revised Statutes of 1874, he, when he was born in Italy in 1906 during the effectiveness of that Act, became a United States Citizen by virtue of the citizenship of his mother; that the language "the children of persons" found in that Act is to be interpreted to include the singular or distributive and that it does not require both parents be citizens; that the language "are now, or have been" in the Act is capable and amenable to pros-

pective application, and in accordance with other constitutional and statutory provisions, requires prospective application in the interest of consistency and legality; that, alternatively, being born in the sole, actual custody of his citizen mother who was then estranged from the alien father, and such sole custody and estrangement having continued through petitioner's entry into the United States, and afterward, he became a citizen by derivation when he in the custody of his mother, returned to the United States, his mother, to all practical considerations, having thus "resumed" her citizenship, and that, therefore, petitioner became a citizen upon such entry under Section 5 of the Act of March 2, 1907; that, alternatively, he became a citizen five years after entry and the commencement of his residence in the United States under the provisions of Section 2 of the Act of May 24, 1934. It is the final position of the petitioner that valuable rights were intruded upon by a government official and that the improper conduct of such official caused petitioner's birth in Italy rather than the United States, and that the Court, under its equity jurisdiction should mend the wrong done petitioner by considering him as having been born in the United States, or, by considering him as having been in being from the time of conception in the United States.

ARGUMENT.

I.

PETITION ACQUIRED UNITED STATES CITIZENSHIP UNDER THE SECOND CLAUSE OF SECTION 2172 OF THE REVISED STATUTES OF 1874.

Petitioner, born in Italy in 1906, claims citizenship as the child of a mother (person) who was at the time of his birth a citizen of the United States under Section 2172 resting his claim on the ground that the Revised Statutes, of which such section is a part provides expressly that words importing the plural (persons) may include the singular, and on the ground that Section 2172, being susceptible of prospective application, must be prospectively applied.

A. The development of the law leading to the enactment of R. S. 2172.

The respondent errs in his primary approach to the background of the section of the revised statutes here under discussion (R. Br. 15 *et seq.*). The common law of the United States is the law as we took it from England at the time of settlement and our Declaration of Independence. It includes "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee, et al.* v. *Hoboken Land and Improvement Co.*, 59 U.S. 272, 277. At least as early as 1350 in England (25 Edward III, Stat. II (see R. Br. 16)), citizenship descended through the doctrine of citizenship *jure sanguinis*, and

citizenship *jure sanguinis* has been the common law doctrine for centuries along with the companion doctrine of citizenship *juri soli.*

Against the co-existing doctrines of *jure sanguinis* and *juri soli,* we then approach the successive legislation "guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it is found that the existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 437. This Court has indicated that a statute purporting to abolish a pre-existing right calls for a convincing explanation of that purpose. *Federal Power Comm.* v. *Niagara Mohawk Power Corp.,* 347 U.S. 239, 252-253.

Thus, the Acts of 1790, 1795 and of 1802 perpetuated the common-law doctrine of *jure sanguinis,* just as the Fourteenth Amendment perpetuated the doctrine of *juri soli.* The Acts, however, limited the right to pass citizenship by blood in excess of the next generation unless citizenship was coupled with United States residence by the father. But, fulfilling the limitation, such children were to be *considered* (regarded) citizens of the United States. The Act of 1855 *declared* (proclaimed) the children of United States citizen fathers, who had or had had United States residence, to be United States citizens.

But, all of the foregoing, except the Fourteenth Amendment, because of their express repeal in the Revised Statutes of 1874, are of but limited assistance to this argument. Rather, we should consider the statute here invoked

(Section 2172) against the background of the common law of *jure sanguinis,* and we find it a reaffirmation of that doctrine, without the qualification of the Acts of 1790, 1795 and 1802, requiring United States residence by the father.

> ". . . the children of persons who are now, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof."

B. The term "the children of persons" in the second clause of R. S. 2172 is the plural used in the distributive or generic sense.

The respondent's full argument, urging that the phrase quoted requires that both parents be citizens, resolves itself into one equivocation, "This use of the plural seems to have been deliberate" (R. Br. 23). Admitting, as he must, that research "has been unable to discover any judicial decisions construing the second clause of the 1802 Act (re-enacted in R. S. 2172)", he proceeds to the John Gould edition of 2 Kent, *Commentaries,* which urges the more comprehensive and liberal interpretation that "persons" in the Act of 1802 be considered to include the singular in his comments Mr. Gould uses the casual example of the father probably occasioned by the presence of the proviso occurring in the Act of 1802 that required residence in the United States by the father, a proviso not present in Section 2172) (R. Br. 24-26).

The respondent avoids the basic fact that in the drafting of statutes, the use of the plural to include the singular or generic is a commonplace, and the intent and operation of a statute drafted in such plural terms is usually so understood. He also avoids the fact that such usual understanding is made positive and specific in the Revised Statutes of which § 2172 is a part. Section 1 thereof

expressly provides that "In determining the meaning of the revised statutes . . . words importing the plural number may include the singular."

Indeed, Mr. Horace Binney, in his article "The Alienigenae of the United States", 2 Am. L. Reg. 193 (1854), much relied upon by Respondent (R. Br. 19, 26), construing this clause as it appeared in the Act of April 14, 1802 interpreted the language "children of persons" as we urge. In voicing his opposition to the statute, he said:

> "All such descriptions as 'the children of persons who are citizens of the United States,' ought most carefully to be avoided in such a statute; for as the words 'children' must be taken distributively to comprehend any child, so 'persons who are citizens' may be understood as also used distributively to comprehend any person, whether father or mother, and thus to make the child of an alien father and citizen mother a citizen." (2 Am. L. Reg. at p. 208.)

The respondent's argument requiring both parents be citizens if carried to its logical conclusion would result in the absurdity that even if both father and mother were American citizens, still they would have to have more than one child to come within the terms of the statute because, applying the reasoning of the respondent, *one* child of American parents would not be comprehended within the term "children".

We submit it is completely apparent that "children of persons" and "the child of a person" are merely alternative modes of expression, that their meaning is exactly the same and that the rule expressed in Section 1 of the Revised Statutes emphasizes the identity of meaning when it says "words importing the plural may include the singular."

To illustrate the confusion resulting from the respondent's attempts to avoid basic statutory construction, and indeed, statutory mandate incorporated in Section 1, the respondent offers this Court two alternatives to his proposed requirement that "persons" means both parents (R. Br. 31). He suggests that "persons" means the father alone, predicated on only the quotation from 2 Kent Commentaries 14th Ed. (R. Br. 25-26), which we have discussed. This first alternative runs counter to basic rules of statutory construction. The word "fathers" is expressly used in Section 1993 of the same Revised Statutes. Respondent urges that "persons" in Section 2172 should also be limited to mean "fathers". In order to bring about the effect contended for by the respondent, it would be necessary to impliedly limit, as the statute specifically does in the earlier section, a provision in the later section. The presence of the limitation in the one part and its absence in the other is an argument against reading the latter provision as implying the limitation. *United States* v. *Atchison, T. & S. F. R. Co.*, 220 U.S. 37.

The second proposed alternative is that "persons" means a naturalized mother, who has theretofore terminated her marriage with an alien father and obtained custody of the child. But this counters reason. The alien father is still a person and the child is still the child of that person. We submit the concession that a divorced citizen mother can pass citizenship to her foreign-born child under this section confirms our argument, for the character and existence of the alien husband cannot be denied.

Some comment is required on respondent's analysis of the cases interpreting the phrase "children of persons" in the first clause of § 2172 as including the distributive. (R. Br. 26-30). The respondent makes the passage of

citizenship through the mother's naturalization dependent upon the fortuity of the alien father's early demise or upon the legal severance of the marriage ties. The interpretation amends the statute, which makes no such qualification. The statute does not grant citizenship through the death of an alien father, but through the naturalization of the mother to her child *if a minor at the time of naturalization.* If we attempt to reconcile the respondent's analysis to the statute, as in *Citizenship of R. Bryan Owen,* 36 Op. Atty. Gen. 197, and if the elder Owen had enjoyed better health, R. Bryan could conceivably have had an inchoate right to citizenship extending into his old age, dependent upon the longevity of his father and his father's pre-deceasing Mrs. Owen, which would be retroactive to the time of naturalization.

In like manner, if the first clause really was intended to be interpreted only in the plural, of what assistance is divorce? The child continues to be the child of his alien parent, whatever the estrangement between the parents. His mother's remarriage to a citizen does not make him the child of the second husband, so as to satisfy the plural interpretation urged.

Respondent concludes his argument on this point with a final suggestion, the only result of which would be the complete obliteration of Section 1993. Persisting in his argument that only a citizen father can bestow citizenship on the child born abroad, he suggests that Sections 2172 and 1993 mean the same thing because "during the period from 1855 to 1922 . . . the citizenship of the father . . . conferred citizenship upon his wife under R. S. 1994" (R. Br. 30). Therefore, the respondent argues, Sections 2172 and 1993 both performed the same function, the conferring of citizenship upon the child born abroad, *only* through the citizen father, because the citizenship of the

father endowed the alien mother with citizenship, and the provisions of Section 2172 were thereby satisfied. But that does not explain the requirement under Section 1993 for prior United States residence by the father if he is the source of citizenship, a proviso that does not appear in Section 2172. If respondent's theory is carried to a logical conclusion, a citizen father who had never resided in the United States, could, notwithstanding the limitation of Section 1993, pass citizenship to his child born abroad by virtue of the provisions of Section 2172 and the automatic naturalization of his alien wife.

We respectfully suggest that the respondent's arguments on this point do not withstand careful scrutiny. We cannot say with certainty what was the reason for the limiting proviso in R. S. 1993. It, perhaps, was a recognition of the fuller freedom of choice of residence in the father. We submit that the distributive interpretation urged by petitioner, is reasonable, logical and legal and should be employed.

C. The second clause of R. S. 2172 should be applied prospectively.

Urging retrospective operation of R. S. 2172, the respondent relies primarily on the interpretation of Mr. Binney, congressional debate reports, certain *obitur dicta* of this Court, and also the expressive language of R. S. 1993.

The respondent urges cases and articles upon us in support of the proposition of retrospective application (R. Br. 36). We do not see the application of *D'Alessio* v. *Lehman*, N.D. Ohio, 183 F. Supp. 345. In *United States ex rel. Guest* v. *Perkins*, D.D.C., 17 F. Supp. 177, the only reference to retrospective application of R. S. 2172 was the court's repeating the contention of the petitioner. The

ruling, itself, relied on the father's never having resided in the United States. The remainder of respondent's authorities include a *dictum* of Chief Justice Taft in *Weedin* v. *Chin Bow*, 274 U.S. 657, which relied upon Mr. Binney's article, *supra*, and which was, in turn, relied upon in *Mock Gum Ying* v. *Cahill*, 9 Cir., 81 F. 2d 940; and 2 Kent Commentaries (14th Ed). A very short examination will reveal that Mr. Binney and 2 Kent Commentaries (14th Ed), as well as Chief Justice Taft, were referring only to the Act of 1802 and not to Section 2172 of the Revised Statutes. *Mock Gum Ying* v. *Cahill, supra*, does stand for the proposition that Section 2172 is to be retrospectively applied only. It is our function here to convince this Court otherwise. But it may be noted that the collective interpretation urged by respondent (R. Br. 22-32) did not enter into the determnation of the Ninth Circuit.

Respondent urges it argument for retrospective application of R. S. 2172 because certain statements by congressmen about the Act of 1802 resolved this point against the interpretation for which we contend. The congressmen's statements were made in 1855 down to 1934, with the notable exception of remarks concurrent or current with the enactment of R. S. 2172. The respondent's argument, in the main, is that legislative action in 1855 settled the interpretation to be accorded to the Act of 1802. This is, of course, not the law. Nothing that any later congress can say or do can affect the meaning of unambiguous language used in the Act of 1802. The meaning of such language must be determined by the courts *when a proper case arises*. We may here note that the Congress of 1855 did not see fit to repeal the Act of 1802, and consequently its meaning is open to judicial interpretation as a matter *res integra*. Further, urging the repeal of the Act of 1802 by the Act of 1855, respondent

summarily ignores the enactment of § 2172 in the Revised Statutes of 1874.

Finally, respondent impliedly urges that "heretofore born" and "hereafter to be born" in R. S. 1993 was the kind of language required for retrospective and prospective application, and that the word "now are or have been" in R. S. 2172 will not avail other than for retrospective application. The respondent has ignored our argument urging this Court to employ accepted statutory construction (P. Br. 10-12). He predicates his argument on the simple expedient of a failure to employ "heretofore" and "hereafter to be" found in R. S. 1993 (though unusual in statutory drafting). We, therefore, invite the Court to consider the language of R. S. 2172 ("are now or have been") in juxtaposition with nationality provisions admittedly prospective. The section speaks in the alternative ("are now or have been") and we take the alternatives separately.

". . . persons who *now are* . . . citizens" (R. S. 2172) speaks of the present existence of a state or condition. ". . . persons *born* . . . in the United States" (14th Amendment) speaks of a present state or condition of existence. Language-wise there appears no reason why the Fourteenth Amendment to the Constitution should be conclusively given prospective application to the exclusion of any argument to the contrary, and R. S. 2172 restricted to retrospective application.

We submit the alternative: "children of persons who . . . *have been* citizens shall . . . be considered as citizens" (R. S. 2172, 2nd clause) and ". . . children of persons who *have been* duly naturalized . . . shall . . . be considered as citizens" (R. S. 2172, 1st clause). Again, language-wise there appears no reason why the latter should admittedly be given prospective application, and the other restricted

to retrospective application. We remind the court that Mrs. Montana, at the time of the birth of her petitioner son, had been a citizen for all of her fifteen years.

Under either alternative in the second clause of R. S. 2172, petitioner qualifies and under either alternative, language, logic and consistent interpretation demands prospective application.

II.

THE PETITIONER BECAME A CITIZEN UPON HIS MOTHER'S RESUMING UNITED STATES RESIDENCE UNDER SECTION 5 OF THE ACT OF MARCH 2, 1907; OR, FIVE YEARS AFTER HE COMMENCED RESIDING IN THE UNITED STATES UNDER THE PROVISION OF THE ACT OF MAY 24, 1934.

It is the submission of the petitioner that upon the separation of his parents, his sole custody was in his mother. Thereafter, he entered the United States with her and in her sole custody and proceeded to reside with her and domiciled with her, while in her sole custody and during his minority. While Mrs. Montana, at that time, could not technically resume the citizenship she had never lost and thereby bestow citizenship on the petitioner, she could to all practical circumstances, resume her American citizenship by her permanent return to the United States under the ruling in *Petition of Black*, D. Minn., 64 F. Supp. 518. The Court of Appeals for the Seventh Circuit rejects the practical approach of the *Black* case, in adhering to the letter of literal "resumption" (R. 55). We submit, in accordance with the *Black* case, that the holding in this cause, "unduly emphasize[s] form rather than substance." (64 F. Supp. at 521).

The respondent urges two avenues of resistence to our submission. He emphasizes that the marriage of pe-

titioner's parents, their separation, his birth, his return to the United States and the subsequent reconciliation of his parents all ante-dated the act of March 2, 1907, and particularly Section 5 thereof. This argument overlooks the fact that the provisions of the Act have been found to be declaratory of the Common Law. *Petition of Drysdale* D.C.E.D. Mich., 20 F. 2d 957, 958. The respondent further argues that custody in the mother will not suffice to confer citizenship, in the absence of absolute divorce of the alien father and the citizen mother, but later concedes the statute is satisfied by mutual separation, as in *U. S. ex rel Gilest* v. *Perkins,* D.D.C., 17 F. Supp. 177 (R. Br. 45-46). It appears that the essence of this line of argument is that separation of the parents, custody in the citizen parent and resumption of the United States residence all coinciding for the bestowing of citizenship upon the child born abroad, can all be defeated if subsequently the citizen mother and the alien father reconcile, though it would appear that marriage to another alien would not defeat the child's citizenship. It is our respectful submission that the coincidence of the elements that satisfy the spirit of the act (the citizenship of the parent in custody; the separation of the parents and the resumption of residence in the United States) acts to bestow citizenship on the child born abroad, and nothing in the law, save the child's own election, provides for defeat of that bestowal.

The petitioner makes the further contention that, in any event, he became a citizen under the Act of May 24, 1934. This Act eliminatees the necessity of termination of the marriage between the citizen parent and the alien spouse. Further, it is not contested by the respondent that Section 5 of the 1934 Act applied to cases arising before 1934 as well as after. The language interpreted

by this Court in *Kelly* v. *Owens*, 74 U.S. 496 ("shall be deemed") is identical with that of the 1934 Act. We urge identical interpretation.

> "As we construe this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms 'married', or 'who shall be married', do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. *They mean that, whatever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also.*" . . . (74 U. S. at 498.)

The respondent's sole reliance is upon the literal resumption of citizenship, notwithstanding the holding in *Petition of Black*, D. Minn. 64 F. Supp. 518, that "The resumption of American citizenship by the mother under these circumstances is just as real and effective within the intent of the Act of May 24, 1934 . . .", and notwithstanding the Attorney General's opinion in *Matter of Coll y Picard*, 37 Ops. Atty. Gen. 90 that the mother should be treated as precisely in the same situation as one who had resumed her citizenship.

The petitioner respectfully submits that the facts of this case satisfy the spirit and intent of both statutes, and that he is a citizen of the United States by derivation of his mother's citizenship.

III.

THE DOCTRINE OF ESTOPPEL IS APPROPRIATELY INTERPOSED.

The respondent's argument on this point, chameleon-like, colors the facts to suit the law he proposes.

1. He says "the trial judge, as fact finder, does not appear to have credited the claim that Mrs. Montana was denied the passport in question." (R. Br. 57). The source of this statement, is not furnished, nor does it appear from the record that her testimony was questioned by either the respondent nor the judge at the trial level. The sole objections to the proof went to relevancy (R. 24, 27, 32) and competency (R. 27) the only cross-examination went to the birth of her other children in the United States (R. 34-35); and the only manifestation by the trial court as to the basis of its adverse ruling was the application of the law to the facts testified to or admitted:

> "By the Court: I think I understand the problem and am familiar with the statutes, and the suit will be dismissed." (R. 35).
>
> "By the Court: You have your record, and I have let you put everything else in there. It is up to you to go to the Court of Appeals." (R. 36)
>
> "By the Court: All you have to do is briefly state what you have told me. That is the law. I cannot by any stretch of the imagination consider your point of view. To me it is not retroactive.
>
> "It is very clear to me that the father is not a citizen, was not a citizen at the time the child was born. There is no question in my mind about it. He isn't a citizen now." (R. 50).

It is respectfully submitted that the argument for a finding of incredibility is not only not supported, it is rebutted by the record.

2. He urges Mrs. Montana's interest in the outcome of the suit because she has "five other living children, all of whom were born in Chicago" (R. Br. 57). Of course, she is interested in the outcome of the suit and her interest would be the same without other children, and with other children born elsewhere. But the trial court made no indication that he "discounted" her testimony on that score, or on any score.

3. He urges that the language ascribed to the consul "'I am sorry, Mrs., you cannot go in that condition • • •. You come back after you get your baby.'". (R. 23) is consistent with a *suggestion* that she wasn't really well enough to travel. (R. Br. 6, 58-59). It certainly does not read as a *suggestion*, nor would it have the impact of a suggestion on a fifteen year old girl in a foreign country.

4. He again urges the incredibility of the testimony because there was no occasion for Mrs. Montana to apply for a passport, that no one needed one to get in and out of the United States at that time. (R. Br. 59-60). Yet the respondent agrees that passports were issued by the United States at that time for identification and convenience and to comply with the internal regulations of various countries, citing 3 Moore, *International Law Digest* 856 and 2 Hyde, *International Law* (2d Rev. Ed. 1945) 1188. Respondent argues that if Italy had required a passport the consul would have issued one. (R. Br. 60). The testimony is that he *did* issue after the birth of petitioner, and the necessary inference is that it must have been required. If the testimony of its issuance is questioned, it should have been easily rebutted.

5. The respondent further argues that Mrs. Montana's father, a United States citizen, couldn't have gotten a passport in a foreign country. (R. Br. 60-61). The fact is that he, by birth, was also an Italian citizen,

Italian law not recognizing the right of expatriation until 1912.

6. The respondent further states Mrs. Montana could have gotten a passport in the "little town" if it had a consular officer, so she didn't have to go to Naples. (R. Br. 61). The "little town" was identified as Acerra, Italy (R. 24). If his argument has merit, it could have been easily supported.

7. Finally, the respondent contends there can be no estoppel, because even if the consul had granted the passport, there would have been no assurance that the petitioner would have been born in the United States, and only improper conduct which directly leads to a certain course of conduct is available for estoppel (R. Br. 62). If the law requires that kind of assurance, especially as to the time and place of the birth of a child, there can, of course, be no estoppel. But, had the consul given her her passport and had she travelled directly to the United States (rather than an unlikely excursionary cruise) and could she have made assurances that her health, stamina and condition were such as they eventually showed themselves to be, then the consul's improper conduct did, in fact, directly lead to a certain course of conduct causing petitioner's birth in Italy.

CONCLUSION.

Wherefore, for the foregoing reasons, it is respectfully submitted that the judgment below be reversed and this cause remanded with instructions for the entry of a judgment declaring petitioner to be a Citizen of the United States.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1960.

Mauro John Montana, Petitioner, *v.* Robert F. Kennedy.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 22, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

Having been ordered deported as an alien on grounds which are not contested, petitioner, claiming to be a citizen, brought the present declaratory judgment action under 8 U. S. C. § 1503 to determine his citizenship status.

Petitioner, whose mother is a native-born United States citizen and whose father is a citizen of Italy (their marriage having been in the United States), was born in Italy in 1906 while his parents were temporarily residing there, and entered the United States with his mother later the same year. He has continuously resided in the United States since that time and has never been naturalized. His claim of United States citizenship is based primarily upon two statutes: (1) Section 2172 of the Revised Statutes (1878 ed.),[1] and (2) Section 5 of an Act of 1907.[2] The Court of Appeals found that neither statute obtained as to one in the circumstances of this petitioner, 278 F. 2d 68. We granted certiorari to review that conclusion, 364 U. S. 861, in view of the apparent harshness of the result entailed. For reasons given hereafter, we agree with the Court of Appeals.

[1] See p. —, *infra*.

[2] See p. —, *infra*.

I.

In 1874 Congress re-enacted two statutes which seem to defy complete reconciliation. R. S. § 2172, a re-enactment of § 4 of an Act of April 14, 1802 (2 Stat. 155), provided that

> "children of *persons* who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. . . ." (Emphasis added.)

R. S. § 1993, substantially a re-enactment of § 1 of an Act of February 10, 1855 (10 Stat. 604), provided that

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose *fathers* were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (Emphasis added.)

Since R. S. § 2172 spoke broadly of children of citizen "persons"—perhaps citizen mothers as well as citizen fathers—while R. S. § 1993 spoke only of children of citizen "fathers" (and even then embraced only citizen fathers who had been United States residents), there is a conflict in the apparent reach of the simultaneously re-enacted provisions.

In this circumstance petitioner, claiming that "persons" in R. S. § 2172 included, in the disjunctive, both citizen fathers and mothers, contends that we are faced with deciding either that R. S. § 1993 simply *repeats*, with modifications, that part of R. S. § 2172 relating to "fathers," (leaving its provisions relating to "mothers" intact), or that it *repeals* that part of R. S. § 2172 relat-

ing to "mothers." He suggests that we make the former choice to avoid the admitted severity of deporting a fifty-five-year-old man who has resided in this country since he was an infant. The Government, on the other hand, asserts that R. S. § 2172 should be read as embracing only children *both* of whose parents were American citizens. Whatever the force of these opposing contentions may be, other considerations unmistakably lead to the conclusion that petitioner's claim to citizenship under R. S. § 2172 must be rejected.

In 1854 Horace Binney, one of the country's leading lawyers and a recognized authority on the immigration laws, published an article entitled "The Alienigenae of the United States" [3] in which he argued that the words "who now are or have been" in the 1802 predecessor of R. S. § 2172 had the effect of granting citizenship to the foreign-born children only of persons who were citizens of the United States *on or before* the effective date of the 1802 statute (April 14, 1802), in other words that the statute had no prospective application. Foreign-born children of persons who became American citizens between April 14, 1802 and 1854, were aliens, Mr. Binney argued. In 1855 Congress responded to the situation by enacting the predecessor (10 Stat. 604) of R. S. § 1993.[4] The provision had retroactive as well as prospective effect.

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[3] 2 American Law Register 193.

[4] That the enacting Congress accepted and acted upon the view that the Act of 1802 (later re-enacted as R. S. § 2172) had no effect as to parents who became citizens after 1802 is clear from the following statement of Congressman Cutting:

". . . the children of a man [U. S. citizen] who happened to be in the world on the 14th of April, 1802, born abroad, are American citizens, while the children of persons born on the 15th of April, 1802, are aliens to the country." 32 Cong. Globe 170, 33d Cong., 1st Sess., Jan. 13, 1854.

but was clearly intended to apply only to children of citizen *fathers.*

The view of Mr. Binney and the 1855 Congress that the Act of 1802 had no application to the children of persons who were not citizens in 1802 has found acceptance in the decisions of this Court. See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 673–674; *Weedin* v. *Chin Bow*, 274 U. S. 657, 663–664; see also *Ying* v. *Cahill*, 81 F. 2d 940. The commentators have agreed. See 2 Kent, Commentaries, at 53; 3 Hackworth, Digest of International Law, § 222; cf. *Matter of Owen*, 36 Op. Atty. Gen. 197, 200. Finally Congress has repeatedly stated and acted upon that premise. See, *e. g.*, H. R. Rep. No. 1110, 67th Cong., 2d Sess., at p. 3. Indeed when, in 1934, Congress finally granted citizenship rights to the foreign-born children of citizen mothers, 48 Stat. 797, it not only specifically made the provision prospective, but further made clear its view that this was a reversal of prior law. See H. R. Rep. No. 131, 73d Cong., 1st Sess., p. 2, and S. Rep. No. 865, 73d Cong., 2d Sess., p. 1.

Whatever may have been the reason for the 1874 re-enactment of the Act of 1802, as R. S. § 2172, we find nothing in that action which suggests a purpose to reverse the structure of inherited citizenship that Congress created in 1855 and recognized and reaffirmed until 1934. On this basis and in the light of our precedents, we hold that at the time of petitioner's birth in 1906, R. S. § 1993 provided the sole source of inherited citizenship status for

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[5] Congressman Cutting explained:

"In the reign of Victoria, in the year 1844, the English parliament provided that the children of English mothers, though married to foreigners, should have the rights and privileges of English subjects, though born out of allegiance. *I have not, in this bill, gone to that extent, as the House will have observed from the reading of it.*" (Emphasis added.) 32 Cong. Globe 170, 33d Cong., 1st Sess.

foreign-born children of American parents. As the foreign-born child of an alien father that statute cannot avail this petitioner.

II.

Petitioner's second ground for claiming citizenship is founded upon § 5 of an Act of March 2, 1907 (34 Stat. 1229), which provided in relevant part "that a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of . . . resumption of American citizenship by the parent. . . ."[6] Petitioner's claim in this regard necessarily depends upon our finding (1) that his mother was an alien at the time of his birth, having lost her citizenship either when she married an alien or when she traveled abroad with her alien husband in 1906, and (2) that his mother resumed her citizenship on her return to the United States.

It is sufficient to dispose of the contention that we find that mere marriage to an alien, without change of domicile, did not terminate the citizenship of an American woman either at the time of petitioner's birth or his mother's return to the United States, both of which occurred in 1906.[7] This view, which is supported by the weight of authority,[8] is indeed not contested by peti-

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[6] In the context of the section it is clear that the word "parent" refers both to fathers and mothers. Section 2 of the Act of May 24, 1934 (48 Stat. 797), on which petitioner alternatively relies, is in all respects here material a re-enactment of the above provision.

[7] By § 3 of the Act of March 2, 1907 (34 Stat. 1228), marriage to an alien *did* terminate the citizenship of an American woman.

[8] See, *e. g.*, *Comitis* v. *Parkerson*, 56 F. 556, 559–560 (D. C. E. D. La.), writ of error dismissed *sub nom. Comitiz* v. *Parkerson*, 163 U. S. 681; *Ruckgaber* v. *Moore*, 104 F. 947, 948–949 (D. C. E. D. N. Y.), affirmed, 114 F. 1020 (C. A. 2d Cir.); *Wallenburg* v. *Missouri Pacific R. Co.*, 159 F. 217, 219 (C. C. D. Neb.); *In re Fitzroy*, 4 F. 2d 541, 542 (D. C. D. Mass.); *In re Lynch*, 31 F. 2d 762 (D. C. S. D.

tioner, who instead asks this Court to construe § 5 of the 1907 Act so as to avoid the obvious paradox of giving preferred treatment to the children of a woman who has lost her citizenship over that afforded to the children of a woman who has never lost her citizenship.[9] Paradoxical though this may be, we have no power to "construe" away the unambiguous statutory requirement of § 5 that petitioner's mother must have lost her citizenship at the time of his birth.[10]

III.

Petitioner makes a further contention. It is urged that the Government should not be heard to say that petitioner was born outside the United States because of its own misconduct. Petitioner's mother testified that she had been prevented from leaving Italy prior to petitioner's birth by the refusal of an American Consular Officer to issue her a passport because of her pregnant condition. However, it is uncontested that the United States did not require a passport for a citizen to return to

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Cal.); *Petition of Zogbaum*, 32 F. 2d 911, 912–913; *In re Wright*, 19 F. Supp. 224, 225 (D. C. E. D. Pa.); *Watkins* v. *Morgenthau*, 56 F. Supp. 529, 530–531 (D. C. E. D. Pa.).

[9] Such a construction was espoused by Attorney General William D. Mitchell in 1933, 37 Op. Atty. Gen. 90, and is also indicated in two District Court cases. See *Petition of Black*, 64 F. Supp. 518; *Petition of Donsky*, 77 F. Supp. 832. But see *D'Alessio* v. *Lehman*, 183 F. Supp. 345, which takes a contrary view.

[10] Moreover, even if petitioner's mother had suffered a loss of citizenship which was later reacquired, petitioner's case would still not come within the statutory definition of "resumption of American citizenship." Congress gave explicit content to this requirement of § 5 of the Act of 1907, § 3 of the same Act providing:

"*At the termination of the marital relation* she may resume her American citizenship. . . ." (Emphasis added.) 34 Stat. 1228. Petitioner's mother has never terminated her marital relation with petitioner's alien father.

the country in 1906. Moreover, petitioner has presented no evidence of any Italian requirement of an American passport to leave Italy at that time. In this light the testimony by petitioner's mother as to what may have been only the consular official's well-meant advice—"I am sorry, Mrs., you cannot [return to the United States] in that condition"—falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth. In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials.[11]

Affirmed.

MR. JUSTICE DOUGLAS dissents.

[11] See, *e. g.*, *Podea* v. *Acheson*, 179 F 2d 306; *Lee You Fee* v. *Dulles*, 236 F. 2d 885, 887.